S. HRG. 109–1007

THE IMPACT OF CERTAIN GOVERNMENTAL CONTRACTOR LIABILITY PROPOSALS ON ENVIRONMENTAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON
SUPERFUND AND WASTE MANAGEMENT

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 8, 2005

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE

39–522 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JAMES M. INHOFE, Oklahoma, *Chairman*

JOHN W. WARNER, Virginia	JAMES M. JEFFORDS, Vermont
CHRISTOPHER S. BOND, Missouri	MAX BAUCUS, Montana
GEORGE V. VOINOVICH, Ohio	JOSEPH I. LIEBERMAN, Connecticut
LINCOLN CHAFEE, Rhode Island	BARBARA BOXER, California
LISA MURKOWSKI, Alaska	THOMAS R. CARPER, Delaware
JOHN THUNE, South Dakota	HILLARY RODHAM CLINTON, New York
JIM DEMINT, South Carolina	FRANK R. LAUTENBERG, New Jersey
JOHNNY ISAKSON, Georgia	BARACK OBAMA, Illinois
DAVID VITTER, Louisiana	

ANDREW WHEELER, *Majority Staff Director*
KEN CONNOLLY, *Minority Staff Director*

SUBCOMMITTEE ON SUPERFUND AND WASTE MANAGEMENT

JOHN THUNE, South Dakota *Chairman*

JOHN W. WARNER, Virginia	BARBARA BOXER, California
CHRISTOPHER S. BOND, Missouri	MAX BAUCUS, Montana
JOHNNY ISAKSON, Georgia	FRANK R. LAUTENBERG, New Jersey

C O N T E N T S

Page

NOVEMBER 8, 2005

OPENING STATEMENTS

Boxer, Hon. Barbara, U.S. Senator from the State of California 7
Clinton, Hon. Hillary Rodham, U.S. Senator from the State of New York 9
Inhofe, Hon. James M., U.S. Senator from the State of Oklahoma, prepared statement 52
Jeffords, Hon. James M., U.S. Senator from the State of Vermont 3
Thune, Hon. John., U.S. Senator from the State of South Dakota 1
Vitter, Hon. David, U.S. Senator from the State of Louisiana 5

WITNESSES

Becker, Paul, president, Willis North American Construction Practice 45
Prepared statement 94
Responses to additional questions from:
Senator Jeffords 96
Feigin, Michael, executive vice president, Bovis Lend Lease Holdings, Inc 28
Prepared statement 69
Responses to additional questions from:
Senator Boxer 71
Senator Jeffords 72
King, Craig S., Government contracts attorney 40
Prepared statement 78
Responses to additional questions from:
Senator Boxer 83
Senator Jeffords 84
Senator Thune 83
Perkins, Warren, vice president, Risk Management, BOH Brothers Construction Company 20
Prepared statement 64
Responses to additional questions from:
Senator Boxer 67
Senator Jeffords 69
Riley, Don T., Major General, Director of Civil Works, United States Army Corps of Engineers 12
Prepared statement 52
Responses to additional questions from:
Senator Boxer 54
Senator Jeffords 54
Schooner, Steven L., co-director, government procurement law program, George Washington University Law School 43
Prepared statement 84
Responses to additional questions from:
Senator Jeffords 90
Senator Thune 91
Shufro, Joel, executive director, New York Committee for Occupational Safety and Health 30
Prepared statement 72
Responses to additional questions from:
Senator Boxer 77
Senator Jeffords 75
Senator Thune 74

Page

Wright, Beverly, Ph.D, director, Deep South Center for Environmental Justice and co-chair, National Black Environmental Justice Network 18
Prepared statement 57
Responses to additional questions from:
Senator Boxer 63
Senator Jeffords 64
Senator Thune 64
Zelenka, Anthony, president, Bertucci Contracting Corporation 15
Prepared statement 55
Response to additional question from:
Senator Boxer 56
Senator Jeffords 57

ADDITIONAL MATERIAL

Article, The Associated Press: Hundreds Sue Over Health Effects of World Trade Center Clean-up 99
Statements:
American Road and Transportation Builders Association 97
American Society of Civil Engineers 98

THE IMPACT OF CERTAIN GOVERNMENTAL CONTRACTOR LIABILITY PROPOSALS ON ENVIRONMENTAL LAWS

TUESDAY, NOVEMBER 8, 2005

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND AND WASTE MANAGEMENT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m. in room 406, Senate Dirksen Building, Hon. John Thune (chairman of the subcommittee) presiding.

Present: Senators Thune, Vitter, Jeffords, Boxer, Clinton.

Senator THUNE. Today's hearing will come to order.

OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator THUNE. We will allow the distinguished Senator from Vermont to make his statement in just a minute, but I want to say good afternoon and thank you to all of you for coming. We are here this afternoon to hear testimony from the U.S. Army Corps of Engineers and various other individuals regarding disaster cleanup efforts that are currently underway in the Gulf Coast region.

Because we have a full hearing today, I will keep my opening remarks brief. As many of you know, roughly 4 weeks following the tremendous destruction that Hurricane Katrina caused the Gulf Coast region, I introduced legislation that seeks to assist in the cleanup and recovery of the most destructive natural disaster in our Nation's history.

Just as our Nation witnessed during the September 11th terrorist attacks, private contractors have stepped forward in the Gulf region to support the Federal Government in providing the resources that are necessary to assist in the recovery of both persons and property dislocated by Hurricane Katrina, to demolish, remove, repair and reconstruct both structures and utilities damaged by the hurricane and to cleanup property polluted by that hurricane and to remove vast amounts of debris, and finally, to de-water flooded areas.

However, because of the ongoing multi-billion dollar class action cases filed against the contractors who assisted the Government in the cleanup of the World Trade Center, I have concerns that other major disaster cleanups, including Hurricane Katrina, may be stymied due to the potential for future lawsuits being brought against

contractors who carry out major disaster cleanups on behalf of the Government.

Just last week, New Orleans' Mayor Nagin testified before the full committee about the destruction the storm had caused. In his testimony, the Mayor noted: "This storm forced hundreds of thousands of people to flee, flooded thousands of homes and decimated many lives. The damage to homes, schools, businesses, hospitals, roads, water plants, communications facilities and electrical power infrastructure was unprecedented. The economic and social fabric of the area was damaged in its entirety."

Because large-scale disaster recovery in the Gulf Coast region doesn't occur in a vacuum, I strongly believe that Congress should provide private contractors with a measurable level of liability protections due to the nature of the work they do and helping the Government restore the basic services the public expects and deserves. Contrary to some claims, my legislation, which is co-sponsored by eight Senators, including Senator Vitter and Senator Lott, does not weaken existing environmental protections; nor does it grant contractors protection from Federal, State or local enforcement actions. It does not limit any Agency's authority or discretion to take whatever steps it may deem necessary to ensure full compliance with its rules or regulations or to punish non-compliance. Nor would the bill relax any duty or obligation that any employer owes to its employees. The bill would leave contractors fully accountable for any failure to protect the safety or health of their employees.

Last but not least, the Gulf Coast Recovery Act would not in any way limit any contractor's liability for recklessness or willful misconduct. There would be no limits on any punitive, non-economic or other damages otherwise recoverable for such recklessness or misconduct. Simply put, my bill would provide private disaster contractors a limited measure of protection comparable to but less than the protection that Federal officials enjoy when exercising their discretion.

[The prepared statement of Senator Thune follows:]

STATEMENT HON. JOHN THUNE, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Today's hearing will come to order. Good afternoon and thank you all for coming. We are here this afternoon to hear testimony from the U.S. Army Corps of Engineers and various other individuals regarding disaster cleanup efforts that are currently underway in the Gulf Coast Region. Because we have a full hearing today, I will keep my opening remarks brief.

As many of you know, roughly 4 weeks following the tremendous destruction that Hurricane Katrina caused the Gulf Coast Region,[1] I introduced legislation that seeks to assist in the cleanup and recovery of the most destructive natural disaster in our Nation's history.

Just as our Nation witnessed during the September 11th terrorist attacks, private contractors have stepped forward in the Gulf Coast Region to assist the Federal Government in providing the resources necessary to assist in the recovery of both persons and property dislocated by Hurricane Katrina, to demolish, remove, repair and reconstruct both structures and utilities damaged by that hurricane, to cleanup property polluted by that hurricane, to remove vast amounts of debris, and to dewater flooded areas.

However, because of the on-going multi-billion dollar class action cases filed against the contractors who assisted the Government in the cleanup of the World

[1]The Corps of Engineers Estimates Katrina left 80 million cubic yards of debris that could take over a year to cleanup. In comparison, Hurricane Andrew left 17 million cubic yards of debris when it struck in 1992.

Trade Center, I have concerns that other major disaster cleanups (including Hurricane Katrina) may be stymied due to the potential for future lawsuits being brought against contractors who carry out major disaster cleanups on behalf of the Government.

Just last week, New Orleans Mayor Ray Nagin testified before the full Committee about the destruction the storm caused. In his testimony, the mayor noted:

"This storm forced hundreds of thousands of people to flee, flooded thousands of homes and decimated many lives. The damage to homes, schools, businesses, hospitals, roads, water plants, communication facilities, and electrical power infrastructure was unprecedented and the economic and social fabric of the area was damaged in its entirety."

Because large-scale disaster recovery in the Gulf Coast Region doesn't occur in a vacuum, I strongly believe that Congress should provide private contractors with a measurable level of liability protections due to the nature of the work they do in helping the Government restore the basic services the public expects and deserves.

Contrary to some claims, my legislation, which is cosponsored by eight Senators (including Senator Vitter and Senator Lott), does not weaken existing environmental protections, nor does it grant contractors protection from Federal, State, or local enforcement actions. It does not limit any Agency's authority or discretion to take whatever steps it may deem necessary to ensure full compliance with its rules or regulations, or to punish noncompliance. Nor would the bill relax any duty or obligation that any employer owes to its employees. The bill would leave contractors fully accountable for any failure to protect the safety or health of their employees.

Last but not least, the Gulf Coast Recovery Act would not in any way limit any contractor's liability for recklessness or willful misconduct. There would be no limits on any punitive, non-economic or other damages otherwise recoverable for such recklessness or misconduct.

Simply put, my bill would provide private disaster contractors a limited measure of protection—comparable to but less than the protection that Federal officials enjoy when exercising their discretion.

Before turning to our first panel, I would like to recognize Senator Boxer, the ranking member of this subcommittee for her opening statement.

Before turning to our first panel, I would like to recognize Senator Jeffords for any statement he may have as the Ranking Member of the full committee, then also I will turn to my colleague, Senator Vitter. Senator Jeffords. Oh, I'm sorry, Senator Boxer——

Senator BOXER. I am happy to wait.

Senator THUNE. Well, let's go to Senator Jeffords as the Ranking Member of the full committee, then we will come back.

Senator BOXER. Absolutely right. I will go after David.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. Thank you for holding this oversight hearing on Governmental Contractor Liability Proposals related to Hurricane Katrina. I am greatly concerned for the people who have been affected by our Nation's largest natural disaster. I will do everything in my power to help them get back on their feet.

As a Nation, our focus should be on rebuilding the Gulf Coast so that residents can safely return to their homes and get on with their lives. Last month, I joined the Democratic members of this committee to introduce S. 1836, the Gulf Coast Infrastructure Redevelopment and Recovery Act of 2005. This legislation would ensure a more coordinated rebuilding effort in the aftermath of Hurricane Katrina. The bill will set up a Federal task force to coordinate Katrina response efforts among the agencies. It establishes the National Preparedness Grants and would work to fix the needless and catastrophic problems we saw emerge in our Nation's emergency response plans.

Our bill also establishes the National Levee Safety Program and requires EPA to develop a comprehensive sampling plan for hazardous substances that may threaten human health or the environment. Recent press reports indicate that the levees in New Orleans may have failed because of faulty construction practices by Government contractors. We must ensure that the rebuilding of the levees in the Gulf Coast region is done by competent contractors who adhere to the law.

Any legislation that would limit the liability of contractors who assist Federal or State Governments with relief and reconstruction efforts in this region is a bad idea. Now, more than ever, our Government's role should be to ensure that citizens are protected from faulty cleanup efforts.

With all that is going on in their lives, the people in the Gulf Coast should not have to worry about contaminated drinking water, hazardous waste exposure, destruction of property, personal injury or even death. These citizens have already suffered a tremendous loss that will take many years to get over. To limit their legal remedies at a time like this is unconscionable.

Simply put, we must not provide corporations with liability shields and exempt them from environmental regulation at the expense of Gulf Coast residents. The rush to cleanup from Katrina is not a rationale for allowing contractor negligence. Given the same Katrina contractors are greatly benefiting from no-bid contracts, we should be extra vigilant to see that it is done right. These contractors and corporations do not deserve special treatment at the expense of those who have lost their family members and homes and jobs.

Thank you, Mr. Chairman.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Mr. Chairman, thank you for holding this oversight hearing on Governmental Contractor Liability Proposals related to Hurricane Katrina.

I am greatly concerned for the people who have been affected by our Nation's largest natural disaster, and I will do everything in my power to help them get back on their feet. As a Nation, our focus should be on rebuilding the Gulf Coast so that residents can safely return to their homes and get on with their lives.

Last month, I joined with Democratic members of this committee to introduce S. 1836, the "Gulf Coast Infrastructure Redevelopment and Recovery Act of 2005." This legislation would ensure a more coordinated rebuilding effort in the aftermath of Hurricane Katrina. The bill sets up a Federal task force to coordinate Katrina response efforts among agencies. It establishes National Preparedness Grants, and would work to fix the needless and catastrophic problems we saw emerge in our Nation's emergency response plans. Our bill also establishes a National Levee Safety Program, and requires the EPA to develop a comprehensive sampling plan for hazardous substances that may threaten human health or the environment.

Recent press reports indicate that the levees in New Orleans may have failed because of faulty construction practices by Government contractors. We must ensure that the rebuilding of the levees, and the Gulf Coast Region, is done by competent contractors who adhere to the law. Any legislation that would limit the liability of contractors who assist Federal or State Governments with relief and construction efforts in this region is a bad idea. Now more than ever, our Government's role should be to ensure that its citizens are protected from faulty cleanup efforts. With all that is going on in their lives, the people of the Gulf Coast should not have to worry about contaminated drinking water, hazardous waste exposure, destruction of property, personal injury or even death. These citizens have already suffered a tre-

mendous loss that will take many years to get over. To limit their legal remedies at a time like this is unconscionable.

Simply put, we must not provide corporations with liability shields and exemption from environmental regulation at the expense of the Gulf Coast residents. The rush to cleanup from Katrina is not a rationale for allowing contractor negligence. Given that some Katrina contractors are greatly benefiting from no-bid contracts, we should be extra vigilant to see that it is done right. These contractors and corporations do not deserve special treatment at the expense of those who have lost their family members, homes, and jobs.

Senator THUNE. Thank you, Senator Jeffords.

Senator Vitter.

OPENING STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator VITTER. Thank you, Mr. Chairman. I will submit my full opening remarks for the record. I will be very brief summarizing them here.

First of all, thank you for this hearing, and thank you for the legislation. As you noted, I am a co-sponsor and I strongly support it. I strongly support it for a real simple reason. I was on the ground virtually every day in the immediate aftermath of Katrina. I saw a lot of folks, including these contractors, at work. I realize that it was very much an emergency situation. Extraordinary emergency measures were being taken because people's lives and property were at risk of further destruction. There was just a flurry of activity to close the levee breaches at the 17th Street Canal, at the Industrial Canal and other locations. That was very much emergency activity.

We need to allow that to happen responsibly in true emergency situations. I believe this bill does that.

It does not protect and shield when there are cases of reckless or willful misconduct. So it clearly doesn't do that. It does not apply to new construction activity. It only applies to true emergency repair activities.

So for instance, in the case of levee work in the New Orleans area, it would apply to that emergency activity, plugging the breaches that I described. It would not apply to new construction activity, for instances, to raise the system to category 5 protection. It is not a pass on Government regulations, environmental and other mandates. It does not affect that in any way.

Finally, it is needed. This is not an academic discussion. We know from true, recent experience after 9/11 that there could well be a flurry of class action lawsuits to try to profit from the emergency measures that needed to be taken, the very quick decisions that needed to be made in a true emergency situation. So this is not some theoretical discussion. We know from a similar situation that it is a very real need.

So again, I thank you for the legislation. I very much thank you for this hearing. I am proud to join you and many others, including Senator Lott, again, from the disaster area, in pushing forward the legislation. Thank you.

[The prepared statement of Senator Vitter follows:]

STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Good Afternoon. I would like to thank the subcommittee's chairman, Senator Thune, for inviting me to this hearing and for his leadership on this very important issue. I would also like to thank all of the witnesses for agreeing to testify before the subcommittee, especially those from Louisiana. I also look forward to hearing from Major General Riley from the Army Corps of Engineers, and I hope that he is able to assure me that the Corps is making a concerted effort to give preference to local contractors.

In the past few months, the State of Louisiana has suffered record devastation from two major hurricanes. Just over 2 months have passed since Hurricane Katrina left an entire major metropolitan area evacuated, flooded and completely closed for weeks. Only a few weeks later, Louisiana was struck by another major storm, Hurricane Rita.

Contractors play a vital role in relief efforts following a natural disaster. The Federal Government relies on contractors to quickly address dangerous conditions that threaten life and property, to restore basic public services, and to protect public safety and health. The Army Corps of Engineers and FEMA have relied on contractors to pump water out of New Orleans and repair the breached levees, many of which began work without a contract. Without the help of the private contractors, the City of New Orleans would still be under water.

However, many contractors need assurances that if they aid in disaster recovery efforts they will not be subject to the same class actions filed against those contractors who helped in the rescue, recovery, and cleanup at the World Trade Center following the September 11, 2001 terrorist attacks. The Gulf Coast region desperately needs contractors to restore the 90,000 square miles damaged by Hurricane Katrina and Hurricane Rita. The Federal Government simply lacks the resources and the expertise needed to cleanup and restore the Gulf Coast region in an efficient and effective manner.

Shortly after Hurricane Katrina made landfall in Louisiana, Senator Thune introduced S. 1761, The Gulf Coast Recovery Act, to limit the liability that private contractors face as they aid in rescue, recovery, cleanup, and reconstruction efforts in the devastated regions. I am proud to say that I am an original co-sponsor of this very important legislation. The Gulf Coast Recovery Act limits the tort liability of those contractors who the Army Corps of Engineers deems necessary for recovery efforts associated with Hurricane Katrina and other major disasters. It does not apply to new construction. So, for example, a contractor charged with plugging the breaches in the levees in New Orleans would be covered by the bill, whereas, a contractor charged with building the levees to a Category-5 level of protection would not.

The Gulf Coast Recovery Act does not limit any public agency's authority to take whatever steps it deems necessary to ensure full compliance with its rules or regulations, or to punish noncompliance. Thus, contrary to the assertions made by many of the bill's opponents, the Gulf Coast Recovery Act does not relieve contractors from their legal obligation to comply with environmental laws. If this bill is enacted, the EPA and its state and local counterparts will retain their full enforcement powers to bring an action against a contractor for noncompliance with rules and regulations.

My interest in Government contracting post-Hurricane Katrina and Hurricane Rita also goes to how the contracts are awarded. First, I am concerned with the award of no-bid mega contracts. While I understand that emergency situations sometimes call for faster action than the Federal Acquisition Regulation's (FAR) full and open competition process allows, I believe that it is in the best interests of the parties involved, including the businesses and the people of the Gulf Coast States, to use full and open competition for all but a very limited number of contracts. Currently, the Federal Acquisition Regulation requires full and open competition except in specific instances. However, I believe that these exceptions should be narrowed only for those activities related to relief and recovery from Hurricane Katrina and Hurricane Rita. In an effort to address this concern, I introduced "The Hurricane Katrina and Hurricane Rita Fairness in Contracting Act", which limits the number of exceptions to the Federal Acquisition Regulation's full and open competition requirement and it requires advance notice to Congress of any non-competitive contracts.

Second, I am concerned that companies from Louisiana and other Gulf Coast States are not being awarded recovery and reconstruction contracts. Although the Stafford Act (42 U.S.C. §5150) contains local preference language, it only requires that agencies give preference to local contractors "to the extent feasible and practicable". I do not believe that the Stafford Act's language is strong enough. There-

fore, I am working with the Senate Small Business Committee to draft stronger local preference language. Since the need for emergency action has for the most part subsided, I encourage Federal agencies to make more of an effort to hire local contractors.

The Gulf Coast region cannot achieve full economic recovery unless the businesses located within that region are given the chance to play a leading role in the recovery and reconstruction effort, and Senator Thune's common sense legislation is an important part of that process.

Once again, I would like to thank Chairman Thune for inviting me to speak at this hearing and for taking a leading role on this very important issue. I look forward to hearing what each of the witnesses has to say.

Senator THUNE. Thank you, Senator Vitter, and thank you for your leadership for the people that you represent who have been victimized by this great disaster, and thank you for your direction and guidance in helping us as we shape responses that are effective and that help get that area back on its feet. Thank you for everything that you are doing.

Senator Boxer.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much.

I just want to pick up on something Senator Vitter said, that in an emergency we need to waive these liabilities. The fact is this bill talks about way beyond emergencies. It talks about repair, cleanup, alteration, remediation, construction and the rest. So I do not agree with Senator Vitter's analysis of it, but I am sure if this bill gets to markup we will have a chance to talk about that.

Mr. Chairman, as your Ranking Member, I want to publicly state that I support very strongly your right to hold any hearing you want, and I know you would do that if I was in the chair instead of the Ranking Member. I just want to make sure that the record is clear: that as your Ranking Member this was not a hearing that I supported. I personally would prefer us to be looking at the ways to help the victims of Katrina. Even though I think you believe that this does help them, I think at the end of the day it hurts them. I am going to go through my brief opening statement.

I think that this committee sometimes loses its charge. This is the Environment Committee. A couple of weeks ago we had a hearing on what I call the Oil Company Protection Act, which was a way to give big oil the ability to get free land to build refineries. Luckily, the committee stopped it in its tracks in a bipartisan vote.

I have to say in all honesty, I think today we are looking at what I call the Halliburton Protection Act, not that it just applies to Halliburton, but it does apply to some of these big contractors.

I think that for us, we should be on the side of the people that get hurt directly, and that we shouldn't be in a situation where we are trying to make it more difficult for them to receive compensation. Government contractors should be held responsible for what they do. It is as simple as that. Otherwise, the burden falls on the victims, the injured workers, or those who live in the disaster-affected region or Federal taxpayers, for that matter.

I think it is wrong, from a moral standpoint, if we are supposed to talk about community and responsibility, this bill flies in the face of that by eliminating the rights of victims. I think it sends a subtle message, or not so subtle, to the contractors, well, do your

best, because if you make a mistake, if you burn toxics, if you do some other things, you know, you won't be held responsible. I am glad the Senator from New York came in here, because later I am going to show you a picture from there, from the horrific experience we had before.

I would ask unanimous consent to place in the record an article that appeared November 4th in the Los Angeles Times talking about the Katrina cough, where we see that mold and muck may be causing respiratory illnesses in people who have returned home. If I might get that into the record?

Senator THUNE. Without objection.

[The referenced information was not submitted at the time of print.]

Senator BOXER. Thank you.

So I wish, as an Environment Committee, we were looking at these victims and figuring out ways to help them and to work with the contractors to help them do the best they can do and to give them that sense of moral responsibility. I mean, what if a contractor exposes children to contamination or sends workers into water filled with waste and people get sick or die? Under S. 1761, a bill, by the way, that is outside this committee's jurisdiction as I understand it, this should fall to Judiciary, the family is forced to bear not only the emotional burden of the injury but also the financial costs of caring for the injured.

It is not hypothetical, and as I say, I am glad that the Senator from New York is here. Let's look at the workers who have been cleaning up and rebuilding the World Trade Center site. We have a photograph, here they are. Sixty percent of all of them who participated in a health monitoring program had at least one respiratory illness. Eighty-five percent of those workers continue to have respiratory illness 4 years later. Only 21 percent of them had appropriate respiratory protection while working at Ground Zero. Only 21 percent of them.

Thank you. I think we remember those faces.

Now we have the Gulf Coast, and we have a bill that could let Government contractors off the hook. The potential is there. The areas hit by Hurricanes Katrina and Rita had 54 Superfund sites. Mr. Chairman, I know you and I have a lot of work to do in making sure we do proper oversight over those cleanups. As of the 1st of November, EPA had not yet completed assessments at 38 sites in the hurricane region. EPA has collected 680,000 household hazardous waste or orphaned containers. Eight million gallons of oil was spilled.

Now, these facts are not the fault of the Government contractors, not one bit. If they are going to decide that they want to work and get paid for their work, they have to follow the rules to protect people, once they get involved in a cleanup. The people in New Orleans have suffered enough. Virtually eliminating their right to get compensation from negligent contractors only compounds their suffering. To me, the most important thing is it sends a terrible signal to the contractors: don't worry about it, because you know, you are off the hook."

One of the reasons we have the safest products in the world, Mr. Chairman, and I can prove this, chapter and verse, is because we

don't let people off the hook when they endanger lives. It isn't just the narrow meaning of reckless endangerment and negligence. We are talking about the way you approach a job, and I think higher of our contractors, I think more of them than they should have this get out of jail free pass.

It isn't right. It sends a wrong signal, and I am disappointed that we are moving forward with this. Mr. Chairman, again, it is your full right, and it is my full right to disagree. At the end of the day, you have the votes, you get a bill out, at the end of the day you don't, you don't get a bill out.

I did want to say today that I have very strong feelings against this bill. I don't think it is what we should be doing in the Environment Committee. This isn't how it can be more gentle to the contractors committee. It really isn't. It is how we can help the victims, that is really what we need to do, how we can help them and protect them from environmental damage.

Thank you very much.

Senator THUNE. Thank you, Senator Boxer. Senator Clinton has joined us as well. Senator Clinton, do you have an opening statement?

OPENING STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator CLINTON. Yes, thank you, Mr. Chairman. I appreciate your raising this issue, because it is a vitally important topic. I want to thank the witnesses for coming here today to testify, particularly those who have come from the Gulf Coast, given the circumstances that they are facing.

Mr. Zelenka and Mr. Perkins are from New Orleans, representing companies that have been heavily involved in the response and recovery efforts since Katrina hit. Dr. Wright is also from New Orleans and working to ensure that the recovery and rebuilding is done in a safe and fair manner for all residents along the Gulf Coast. I really appreciate what you are trying to do under very difficult circumstances.

As my colleague, Senator Boxer, said, we have some of the same kinds of challenges after 9/11. We know that there are many, many difficult issues that have to be sorted out. I appreciate and welcome Joel Shufro of the New York Committee on Occupational Safety and Health for being here. NYCOSH is an outstanding and well-respected organization that I have worked with closely on a number of 9/11 issues.

I also appreciate very much Michael Feigin from Bovis Lend Lease Holdings being here. Bovis was one of the four contractors that got the contracts for the cleanup on Ground Zero. They each did a quadrant, they came in ahead of time and below budget. They did a really superb job.

I think we all share common goals about how we face these disasters, whether man-made in the case of New York or natural in the case of the Gulf Coast. How we respond and how we respond in an effective, cost-effective manner. When disaster hits, we obviously turn to those who know how to do the job, contractors and experienced employees.

We do expect that the contractors who are called upon will comply with Environmental and Occupational Safety laws and take precautions to protect their employees. We expect that employees who are injured or who develop medical problems as a result of their recovery work should receive the care and compensation they deserve.

Now, these are familiar problems, and there are lessons that can be learned from what happened on September 11th and in the months following. Unfortunately, with all due respect, Mr. Chairman, I think S. 1761 ignores and mis-applies the lessons of September 11th.

When the World Trade Centers and the surrounding buildings collapsed, it created an unprecedented demolition and cleanup challenge. Literally, there were workers who were in mid-town or uptown or Brooklyn who dropped what they were doing at the construction sites they were working on and brought their equipment and were there by that evening ready to help. We really tried to set up a system that would be effective but also fair to everyone involved.

I have been outspoken in my criticism of the Federal Government response, particularly in the first days after September 11th. We did have a lot of workers on the pile who didn't have adequate equipment for personal protection.

We know from an EPA IG report that there was interference from the highest levels of our Government, with EPA communications about the pollution hazards in lower Manhattan. That affected both the employers and the employees who were there at Ground Zero. It obviously affected more directly the people who were digging through the rubble and spending 16, 18 hour days on the pile. We now are living with the consequences that we have a lot of people who have chronic illnesses.

Now, the Centers for Disease Control issued a study last September that found that the 3 days following September 11th when exposure was greatest and therefore the danger most acute, only 21 percent of the study's participants reported using respirators. For some, those were not available. For others, they were so anxious to work that they just plunged ahead and didn't want to have the discomfort, in their opinion. There was a lot of confusion at the site about what kind of personal protection should have been available to them.

The bottom line is that we have large numbers of participants who were at Ground Zero with persistent respiratory problems. The findings that we have is information collected by the Mt. Sinai's World Trade Center Worker and Volunteer Medical Screening Program. We have documented these health problems and we know that we can learn from this.

The lesson is not that we need to provide unprecedented and sweeping liability waivers. I understand why any contractor faced with the challenge of responding to these disasters obviously wants financial protection. There are other ways we can try to provide that. We need to be sure that our Government agencies do a better job advising contractors and workers about the hazards they face.

We need to establish a system to track the health of first responders, something Senator Voinovich and I have worked closely

on. We actually have a bill to provide Stafford Act authority to do this in disaster areas, and to follow up on the medical needs.

What we did in New York was to have a captive fund. As you will hear in the testimony from Bovis, they couldn't get insurance. Nobody would write a policy for them, because we didn't know what the liabilities would be.

I think that we need to come up with a more comprehensive solution, because otherwise, if we don't plan ahead, the Government is going to pick up the cost, as we have found we are trying to do with all of these injured workers. We are going to have to continue to provide some kind of care and compensation and we want to do it in a way that doesn't unduly burden the contractors, but also doesn't throw out the window everything we have learned.

So I think, Mr. Chairman, that your legislation in my view is not the answer but the problem you have identified is a real problem. So we need to figure out how we can address it together.

[The prepared statement of Senator Clinton follows:]

STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. This is a vitally important topic, and I appreciate the opportunity to discuss it here today.

I want to thank all of our witnesses for coming to testify.

Many of you have come a long way. I particularly want to thank the witnesses who came from the Gulf Coast.

Mr. Zelenka and Mr. Perkins are from New Orleans representing companies that have been heavily involved in the response and recovery efforts since Katrina hit. Dr. Wright is also from New Orleans, and is working to ensure that recovery and rebuilding are done in a safe and fair manner for all residents of the Gulf Coast regions.

I thank all of you for the work that you have done and are continuing to do under extremely trying personal and professional circumstances.

I also particularly want to welcome Joel Shufro of the New York Committee on Occupational Safety and Health for being here to testify. NYCOSH is an outstanding and well-respected organization that I have worked with closely on a number of 9/11 issues.

I think that we all share common goals.

When disaster hits, we want our Government to respond.

Our Government's response has to rely on contractors and their employees.

We also expect that in doing response work, contractors will comply with environmental and occupational safety laws and will take precautions to protect their employees.

We expect that employees who are injured or who develop medical problems as a result of their recovery work should receive the care and compensation that they deserve.

I think probably everyone here can agree on those goals.

These are familiar problems to me, as we encountered them in the aftermath of September 11 in New York City.

There are lessons learned from September 11 that should be applied in the Gulf.

Unfortunately, S. 1761 ignores and misapplies the lessons of September 11.

When the World Trade Center collapsed, it created an unprecedented demolition and cleanup challenge.

Contractors and their employees responded swiftly, and worked tirelessly under difficult and dangerous conditions to remove debris from Ground Zero.

Now, I have been outspoken in my criticism of the Government response—particularly in the first days after September 11.

An August, 2003 EPA Inspector General Report concluded that the White House interfered with EPA communications about air pollution hazards in Lower Manhattan.

I said it then, and I will say it again now: that is unacceptable.

It is possible that the Government's missteps contributed to the fact that proper precautions were not taken as much as they should have been.

A Centers for Disease Control study issued last September found that in the three days after September 11, when exposure was greatest, only 21 percent of the study's participants reported using respirators.

The CDC study also found that half of the study's participants had new and persistent respiratory problems and more than half had persistent psychological symptoms.

These findings are reinforced by information collected by Mt. Sinai's World Trade Center Worker and Volunteer Medical Screening Program. Dr. Steven Levin, who is the co-director of that program, has documented continuing health problems among first responders, contractor employees, and others who worked in lower Manhattan.

There are lessons to be learned from all this.

The lesson is not that we need to provide unprecedented and sweeping liability waivers for contractors.

Instead, there are other lessons from September 11 that we need to apply.

We need to be sure that our Government agencies—EPA and OSHA—do a better job advising contractors and workers about the hazards they face.

We need to establish a system to track the health of first responders and recovery workers—this is something Senator Voinovich and I have worked closely together on since September 11. We have a bill to provide Stafford Act authority to do this in disaster areas, and we need to pass that legislation.

We need to attend to the medical needs of those who develop health problems. I am fighting now to prevent the Administration from reneging on their pledge to provide $125 million for workers compensation and medical expenses of 9/11 first responders.

I am sympathetic to the challenges that contractors face in getting liability insurance. That's something we went through in New York.

To the extent that contractors cannot obtain the liability insurance that they need to do the work, then Congress should consider stepping in.

As Mr. Neigin points out, this is what we did in New York when the Ground Zero contractors were unable to purchase liability insurance in New York City.

It's not clear to me from reviewing the testimony whether that type of program is necessary for the Gulf Coast effort.

Along with better monitoring and help for workers, that's a proposal that we ought to consider, rather than the approach in S. 1761.

Senator THUNE. Thank you, Senator Clinton.

We have a vote going on right now, Senator Boxer went to vote, and she will return. I think what we will try and do is continue to move forward with the hearing. Our first witness today is General Riley, with the Army Corps of Engineers. General, it is good to have you, and we welcome your participation today and look forward to an update about how the contracting process is going down in the Gulf Region.

General Riley, please proceed with your testimony.

STATEMENT OF MAJOR GENERAL DON T. RILEY, DIRECTOR OF CIVIL WORKS, UNITED STATES ARMY CORPS OF ENGINEERS

General RILEY. Thank you, Mr. Chairman and members of the subcommittee.

I am Major General Don Riley, Director of Civil Works, Army Corps of Engineers. Thank you for inviting me to testify today.

Under the National Response Plan, the Corps has been assigned Emergency Support Function 3, public works and engineering. Under this ESF–3, the Corps assumes the lead in the procurement of water and ice, provision of temporary power, installation of temporary roofing and removal of debris. Prior to emergencies, under the 6-year old advance contracting initiative, or ACI program, we competitively award contracts for future use. We used our ACI contracts to support our response to the recent hurricanes.

During the emergency, the FAR allowed us to shorten the standard time period of award. For example, we awarded the contract to unwater New Orleans under the urgency exception to the Competition in Contracting Act. In our other response missions, the Corps considered and used the entire suite of available contracting options authorized under the FAR, including verbal and letter contracts.

Using these methods, the Corps found available local contractors and procured such critical items as sand bags to be used to stop the flow of water into New Orleans. Additionally, we made use of an existing Naval facilities contract to assist in the un-watering of the city. In addition, the Corps awarded debris and roofing contracts in excess of those contracts pre-placed under the ACI program.

Also, within 2 days of the storm, I directed our internal review staff to team with the Defense Contracting Auditing Agency and the Army's Criminal Investigation Division and deploy to the area of operations. Their mission, which is still ongoing, is to provide oversight of the operation, to include looking for instances of fraud, waste and abuse and to review contracts.

We are now working to return to standard procurement operations. We are advertising our requirements for longer periods than we did under the urgent situation. We are attempting to give prospective contractors as much time as possible to prepare their proposals, and we are using the non-emergency provisions of the FAR to the maximum extent possible.

Additionally, the Corps has made extensive use of standard authorities granted to us under the various small business set-aside programs, especially 8(a) firms. We have also held and will continue to hold 8(a) competitions.

When we have awarded contracts to large businesses, we encourage the use of local business subcontractors. For these contracts, we have instituted goals for small business subcontracting and reporting. Contractors report their subcontracting efforts to us weekly for the first 90 days and monthly thereafter instead of every 6 months, which is the typical reporting requirement.

To help disaster-stricken communities, we have also inserted clauses citing our preference for use of local subcontractors.

Mr. Chairman, thank you again for the opportunity to testify and I would be happy to answer any questions.

Senator THUNE. Thank you, General.

Let me just ask this question. From your testimony today, would it be accurate to say that the Corps of Engineers would be unable to address major disaster cleanups without assistance from the private sector?

General RILEY. Yes, Mr. Chairman, it sure would. We don't do anything alone. We contract 99 percent of our construction and over 50 percent of our architectural and engineering work is contracted. So we see ourselves as just being a piece of this partnership with the local community and private contracting firms.

Senator THUNE. Do your contracts, when you do a contract with these private firms, do your contracts require that the contractors who perform on those comply with environmental, labor, safety laws, existing laws?

General RILEY. Yes, sir. We comply with all the appropriate laws and all permitting requirements, and require the contractor to do that as well.

Senator THUNE. What would be the risk of not expeditiously addressing the aftermath of major disasters? If you were to follow your normal procedures and the FAR and everything else, when it comes to issuing contracts, would you sort of explain why it is you do things the way you do?

General RILEY. Mr. Chairman, there are emergency provisions under the FAR which we used quite substantially in the early days of this disaster, in addition to the ACI contract program. The danger, of course, is it is an emergency and we need to get contractors out there quickly. One contractor that you have on the next panel, we made a phone call to and he moved on a verbal order and then we followed that up with a letter contract and then we continued to refine the specifications and processes after that.

That is all allowable within the FAR, but that is both a risk to the Government and to the contractor when you move in an emergency situation like that.

Senator THUNE. Based on your experience, was the situation with Katrina different than other Federal procurement you have undertaken, and if so, what were some of those differences?

General RILEY. Mr. Chairman, I think that the major difference was just simply in the magnitude of the problem. It was an unprecedented disaster, huge destruction to personnel and property from 100 miles from Grand Isle to the Gulf Coast. So it was different in that sense, although we followed all the appropriate laws and the emergency authorities that we have as well as that the Government has.

For instance, in the case of NEPA, the National Environmental Policy Act, there were authorities that reside with the oversight of CEQ, the Council of Environmental Quality in the White House, and they issued some emergency procedures under NEPA. It was all allowable within the law.

Senator THUNE. But this one, in terms of the magnitude, obviously very different than any previous disaster you have dealt with. In terms of the contracting process, fairly similar in using and exercising these emergency powers that you have, at which time you can go out and just, if you have to, find somebody who can do the job, get them in there on the job immediately. Not doing that, I assume, of course means that you run great risk to the people who are involved.

General RILEY. That is correct. The risk is, if you don't act quickly there is a severe health and safety problem, if you don't get the ice and water there quickly or if you don't get the flood waters stopped quickly, or if you don't get a roof on a house quickly, you dramatically increase the cost to FEMA in the long run if you don't act quickly.

Senator THUNE. Have you worked closely with the other agencies in this particular disaster and FEMA and others, their relationship and so forth as it has unfolded? I know there were a lot of early criticisms. It appears now from a distance that there is a unified front, so to speak.

General RILEY. Yes, sir. We work essentially for FEMA in disaster operations. We do have authorities of our own in flood control and navigation, but all the other operations that I described were under the mission taskings from FEMA.

Senator THUNE. I think what we will do, I assume Senator Boxer is going to have questions for you, General Riley. She will return from voting in just a moment. Those are all the questions I have for you. Since we don't have other members here, I assume we are all over on the floor voting, we will take a temporary recess until she returns. I am going to have to go over and vote, too, or they are going to clank the gavel down on me.

So we will recess for a moment, and as soon as Senator Boxer returns, we will commence and she can pose her questions of you.

[Recess.]

Senator THUNE. This hearing will come back to order.

General, I think you lucked out. We are going to be able to release you, but if you could stay with us for just a minute, I talked to Senator Boxer on the floor, she does have at least one question for you. So I might bring you back up.

I would like to bring up our second panel, if that's OK, and then we will get them started with their testimony. Then when Senator Boxer returns, if she does have a question for you, I think she just had one question she wanted to pose. We will let you go and ask the second panel to come up.

On the second panel, we have Mr. Tony Zelenka, who is President of Bertucci Contracting Corporation from Jefferson, LA; Dr. Beverly Wright, Deep South Center for Environmental Justice; Warren Perkins, who is Vice President for Risk Management at Boh Brothers Construction; Michael Feigin, Executive Vice President and Chief Administrative Officer of Bovis Lend Lease Holdings, Inc.; and finally, Dr. Joel Shufro, New York Committee for Occupational Health and Safety.

I don't know if he is with us here or not. Perhaps not. But we will just start, we will go from left to right, so Mr. Zelenka, if you would proceed. If you could, we are probably going to have another series of votes about an hour from now. So we are going to try and adhere, if we can, to the 5-minute rule when it comes to oral testimony. We will make sure that all your written testimony is made a part of the record.

Thank you for being here.

STATEMENT OF ANTHONY ZELENKA, PRESIDENT, BERTUCCI CONTRACTING CORPORATION

Mr. ZELENKA. Thank you, Chairman Thune, Ranking Member Boxer and the distinguished members of the subcommittee, for this opportunity to testify on Louisiana's struggle to recover from Hurricane Katrina and the great need for legislation along the lines of the Gulf Coast Recovery Act, which I support and urge Congress to enact.

I am Tony Zelenka, I am President of Bertucci Contracting Corporation. My company is a small business that performs levee and coastal restoration work across the Gulf Coast. I was born and raised in New Orleans, and I have over 20 years of experience in the construction industry.

My family's firm traces its history back to 1875, when my great-great-grandfather founded the company in New Orleans. The morning after the hurricane hit the Gulf Coast, I waded through chest-deep water to reach the closest highway, carrying my bicycle over my head so I could ride to my truck and then drive to check on my family, which had evacuated to Jackson, MS. I had stayed behind to make sure our home and businesses survived the storm.

While with my family, I learned that the levees in New Orleans had failed. I knew that the Army Corps of Engineers was going to need contractors to stop the flooding, so I headed to the Corps' emergency response center in Vicksburg, MS. After meeting with Corps officials that first day, and with no more than an oral agreement to execute a written contract, I went to work hauling stone and rock to repair the breached levees that had flooded New Orleans. I was one of the first contractors to arrive on the scene.

In a situation like this, contractors like me focus on protecting our employees and helping our communities as quickly as possible. Under the direction of the appropriate authorities, we help our Country recover from one disaster after another. We are the first entities, the first responders to arrive on the scene of a disaster with the goal of providing whatever support we can.

In the case of Hurricane Katrina, we did everything we could to stop the water from pouring into New Orleans, and for the past 10 weeks, we have been working 7 days a week. Personally, this disaster has touched many contractors in the area. While my home, thankfully, was spared from the devastation, many of my employees and their families' lives have been ruined by this disaster. As we continue our efforts to cleanup the city, I have also sought to help my employees re-establish their lives and livelihoods.

The cleanup process in New Orleans continues to move forward. Standing side by side with my employees, I have personally done a lot of the work, and I have done it under crisis conditions. From the beginning, we have worked with personal protective equipment and done our best to protect ourselves from the many hazards. Like it or not, we have had to wade through the flood waters and deal with the spray that the helicopters caused. We continue to deal with gas leaks, oil spills, downed electrical lines and backed up and overflowing sewer lines.

While all of you have been watching the devastation on television, we have been living it. Many of my employees are still homeless and have had their families displaced. My city is uninhabitable. In fact, I am a little nervous about being away from the job site for the first time since this terrible tragedy first happened.

Construction contractors have a critical role in providing disaster assistance to Federal, State and local officials. We are essential in the rescue of both persons and property. Our Country has never experienced a dislocation of the size and scope of Hurricane Katrina. Contractors like me stopped the flow of water into the city, and we will be busy for months on the demolition, removal, repair and reconstruction of both structures and utilities damaged by the hurricanes. We will cleanup property polluted by the hurricane, remove vast amounts of debris and de-water flooded areas. This is our city, and we want to bring it back.

Unfortunately, there are people out there who want to capitalize on this tragedy and others like it. Lawsuits have been filed against contractors who have performed the types of rescue and recovery work my firm has been doing in New Orleans. Take a look at what happened in New York after the terrorists on 9/11. Hundreds of lawsuits were filed against contractors for the heroic work they did to cleanup Ground Zero in a short amount of time at the express direction of the Federal, State and local authorities. I have attached an AP story to this testimony that reports on the litigation.

[The referenced AP Article can be found on page 99.]

The madness has already started in Louisiana, where a contractor was named as a defendant in a class action only 3 weeks after the hurricane hit. The trial lawyer sued the contractors for building a faulty levee which the contractor did not build in the first case. The case was dismissed after a few days, but it is a prime example of the hunger out there, no matter how arbitrary the suit may be, to sue contractors.

I worry that I may be sued for property damages as part of the cleanup. Recently I have been hired to work on the massive debris removal contract in New Orleans, which may include the demolition of private homes damaged by the hurricane. This is a very emotional situation, even though all levels of Government have determined that many of these homes are completely uninhabitable and beyond repair or restoration. The Government has decided that they must be torn down and completely rebuilt due to the flooding, hurricane winds and mold.

I now fear legal risks for moving ahead and doing exactly and only what the Government hired me to do. Why am I worried? Because everyone has spent all this time looking for someone to blame instead of looking for a solution. Meanwhile, contractors are expected to continue the cleanup and do it as safely and quickly as possible, despite an uncertain legal and logistical environment.

Remember, unlike many public officials and their agencies, contractors have no sovereign immunity. We look to the Government at all levels for guidance on the best way to do this work safely and efficiently. Ultimately, in emergency situations, we have to put our assets on the line if we want to help, which means I may be at risk of losing my company for simply doing what I have been hired by the Federal Government to do: trying to help save my city.

I believe passing the Gulf Coast Recovery is necessary to ensure that contractors like me will be there to do the work in the future without fear of reprisals. The bill offers limited protection to Government contractors from any citizen suits that might result from their performance on a disaster recovery contracts, enabling them to focus on the work. This legislation would give my firm a reasonable measure of protection, allowing me to pass this fifth generation family business on to the sixth.

Do not let the trial lawyers penalize the contractors like me who report for duty. We are a critical link in the restoration of our city. I ask you to pass this legislation.

I also ask you to do something else. Listen to the experts, listen to the Army Corps of Engineers, listen to local levee districts. Do not shortchange the rebuilding and flood protection efforts underway.

I have been asking for increased funding for the Southeast Louisiana Urban Flood Control project for years. Unfortunately, my calls for increased funding to rebuild the wetlands and coastlands and provide additional protection for New Orleans have consistently fallen on deaf ears. Please tell your colleagues to not only increase investment, but fully fund this national priority.

Please approve the Gulf Coast Recovery Act, and please commit to rebuilding my city. Thank you for this opportunity to comment, and I look forward to working with the subcommittee, and I am happy to answer any questions.

Senator THUNE. Thank you, Mr. Zelenka.

Dr. Wright.

STATEMENT OF BEVERLY WRIGHT, PH.D, DIRECTOR, DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE AND CO-CHAIR, NATIONAL BLACK ENVIRONMENTAL JUSTICE NETWORK

Ms. WRIGHT. Good afternoon, Mr. Chairman. I am Dr. Beverly Wright, Director of the Deep South Center for Environmental Justice at Dillard University, formerly at Xavier University. Regrettably, both of these Historically Black Colleges are underwater now and temporarily closed due to Hurricane Katrina. I am also here today representing the National Black Environmental Justice Network.

Thank you for the opportunity to testify before the Subcommittee on critical issues of concern in the aftermath of the hurricanes. My professional and personal experiences of growing up, living and working in the city of New Orleans greatly influenced my perspective and testimony. Just like Tony, I can trace my ancestry back seven generations in the city of New Orleans, extending from free coloreds in that city. So I am very much vested in the city of New Orleans.

The Mississippi Gulf Coast region suffered severe environmental damage during Katrina, the extent of which has yet to be determined. Massive amounts of toxic chemicals were used and stored along the Gulf Coast before the storm. Literally thousands of sites in the storm's path used or stored hazardous chemicals, from the local dry cleaner and auto repair shops to Superfund sites and oil refineries in Chalmette and Meraux, LA.

Katrina displaced just under 350,000 school children in the Gulf Coast. An estimated 187,000 school children have been displaced in Louisiana, 160,000 in Mississippi, and 3,118 in Alabama. The powerful storm closed the entire New Orleans public school system. More than 110,000 of New Orleans' 180,000 houses were flooded, including my own, and have set for days or weeks in more than six feet of water. As many as 30,000 to 50,000 homes city-wide may have to be demolished, while many others could be saved with extensive repairs.

Katrina affected over 2,000 black-owned businesses in Mississippi. These firms generated over $126 million in sales and receipts in 2004. More than 20,000 black-owned businesses were affected in Louisiana. These firms generated sales and receipts of $886 million a year. It is likely that many of these businesses will not recover.

Katrina could hurt over 60,000 black-owned businesses in the Gulf Coast region that generate $3.3 billion a year. Black-owned businesses have met roadblocks and have been virtually frozen out of the rebuilding of the Gulf Coast region. Complaints about being shut out of the Gulf Coast reconstruction are not limited to minority-owned firms. Many white Gulf Coast workers and businesses also rail about being left out, while they see out of State companies receiving the lion's share of the contracts.

The annual payroll alone in the metropolitan area hardest hit by Hurricane Katrina, those being New Orleans, Biloxi and Mobile, exceeded $11.7 billion in 2002.

Short-term rebuilding objectives must not outweigh long-term public health protections for all Americans and the environment they depend upon. Some of the legislative proposals now under consideration in the aftermath of Katrina do not adhere to these principles. Congress must act now to protect our most vulnerable populations and preserve our most unique and irreplaceable resources.

It is ironic that the tragedy of Hurricane Katrina is being used to justify sweeping waivers of public health, safety and environmental laws. The Gulf Coast Recovery Act would leave many citizens without a remedy against contractors that cause irreparable harm to the air and water. The bill gives unprecedented legal protection to contractors being paid for work related to Katrina in areas of rescue, recovery, repair and reconstruction.

The bill is far-reaching in that these protections do not only apply to Katrina contractors. Under the bill, they will also apply to contractors in all future disasters that result in at least $15 billion of Federal assistance.

The Gulf Coast Recovery Act, while designed to help victims of Katrina, could very well end up helping everyone but the victims in the long run. S. 1761 is particularly egregious to low income and minority communities in the Gulf Coast region. All of the limitations apply only to actions brought by private citizens. The Section 4 limitation on filing a lawsuit is specifically limited to private parties and Section 5(e) specifically provides that nothing in that section limits an action that any Governmental entity may bring.

I thought that the Government's role was to protect the citizenry. This bill seems designed to do just the opposite. By eliminating the threat of liability for contractors, you in effect remove an essential protection for the public. Where there are no consequences there are higher risks and general disregard for the public safety.

This bill seems not to be well thought out. The actions taken by this bill, in my opinion, aptly depicts the moral of the old adage of throwing out the baby with the bath water. We should remember that in this case, it is not the contractors who are the victims. Powerful corporations with huge Government contracts will make millions in profit from the Katrina tragedy. The payments will be made with our tax dollars.

This bill should be rejected by the Senate. In essence, it will ultimately defeat the overall purpose of cleaning up the Gulf Coast and setting the road for its recovery. If contractors no longer fear legitimate legal liability, where is the incentive to do good work? When the dust settles, with possibly untold numbers of properties

improperly cleaned up, debris inadequately disposed of with personal injury due to contractors' negligence, who will pay that bill?

The victims of Katrina have suffered immensely, first from an inadequate response that cost the lives of many citizens, the loss of property, family members and their communities. Now the Government will hold harmless contractors who may further injure the citizenry through neglect and irresponsibility without liability.

These citizens of the United States and victims of the worst natural disaster every in North American have been placed in double jeopardy by this event. In each instance, the Government has played a major role, first with the slow and inadequate response to Katrina and now with the quick response that fails to adequately protect citizens in the aftermath of the storm.

I believe that the most important question to ask when the Senate examines this bill is not who will this bill help, but who will this bill hurt. What segment of our society will be left unprotected and who will be denied a basic legal right in this Country to sue a party that has caused irreparable harm to your family and your property?

A major reason cited by the proponents of this bill for its existence is that it is in the national interests to have private contractors assist public officials in times of disaster. What I disagree with is the statement that well-founded fears of future litigation and liability under existing law discourage contractors from assisting in times of disasters. From where I sit, this statement is a complete fabrication.

Senator THUNE. Dr. Wright, if you could summarize.

Ms.WRIGHT. I'm over time?

Senator THUNE. Yes. You are considerably over.

Ms. WRIGHT. In fact, for every contractor that you find who is hesitant to accept billions of dollars in contractors, I can find hundreds who will. In fact, there was nearly a riot at a recent meeting in Baton Rouge with all of the large companies who received no-bid contracts for work after Katrina by local businessmen who have lost everything looking for work.

In closing, what I want to say is that there are many contractors, particularly small businesses, minority businesses, who are willing and ready to take the charge of doing this work and they are also willing to take the responsibility of liability.

Senator THUNE. Thank you, Dr. Wright. We will include your entire statement as part of the record, the parts you didn't get to.

Mr. Perkins.

STATEMENT OF WARREN PERKINS, VICE PRESIDENT, RISK MANAGEMENT, BOH BROTHERS CONSTRUCTION COMPANY

Mr. PERKINS. Thank you, Mr. Chairman, thank you for the opportunity to testify before the subcommittee.

My name is Warren Perkins, I am vice president, Risk Management, for Boh Brothers Construction Company. I serve with the responsibilities for risk management and controlling and advising on being able to transfer risk in our company where we can and protect our company. I am here today to express the company's views on matters before this subcommittee.

My President, Mr. Robert Boh, intended to be here. He, like Tony, was nervous to be away from operations. We have 100 plus jobs that were pre-Katrina projects that we can't get back to. He is meeting with agencies to try to get back to work, try to get our people back to work. So he sent me. This is kind of under my purview, and I am happy to have his confidence that I will represent the company well.

Boh Brothers is a general construction contractor native to Louisiana and based in New Orleans. It is a closely held, 96 year old company. We are a civil contractor, Union contractor in Louisiana. We pursue and get work throughout the entire Gulf Coast region. Basically, we are a civil contractor that does bridge work, roads and sewer drainage, levee, flood protection system type work.

Boh Brothers and its employees are among the many victims of Hurricane Katrina. The company lost equipment and its work was interrupted. The hurricane shut down all of its projects in the greater New Orleans area, and even today, only a handful of those projects have resumed. Many are in jeopardy of being canceled.

Moreover, as the storm approached, all the employees in the greater New Orleans area had to evacuate to other locations. I had to move my family to an aunt's house in Montgomery and work in an office that was set up for me in downtown Montgomery. When I finally returned, I learned that my house was flooded with a foot of water. I have been living in it and working on my home ever since and commuting to Baton Rouge, where we had to relocate our office, because we could not work out of our office in New Orleans.

As soon as the storm passed, Boh Brothers started scrambling to locate its people to ensure that they were safe, to let them know that we were temporarily moving our headquarters to Baton Rouge. It took a week for us to locate 50 percent of them. It also took us several days to assess the condition of our main office, equipment yard and job sites and the damage done to the city as a whole.

Before Katrina hit, Boh Brothers had over 180 piece of equipment worth over $60 million strewn out through the greater New Orleans area. It took us 2 weeks to recover some 50 percent of them. Many pieces were damaged, destroyed or lost.

During that time, we also set up a command center where we received emergency calls for recovery operations, including emergency repairs to breached levees. We were asked to deploy personnel and equipment to the downtown area and to stop the flooding. By the end of the first week, we have received more than 10 requests from Government agencies to fill breaches in the levees, to pump water out of flooded areas, to move barges out of blocking parts of the inland waterway and to repair bridges over waterways that needed to be repaired because of Katrina.

To get to the areas that needed our help, we had to find access routes through flooded streets and around debris and power lines, all at the risk of our employees. We also had to do our very best to protect our people from environmental and other hazards. We made sure to comply with all OSHA and maritime regulations, but that was just the beginning.

As soon as we could, we hired two engineering companies to do environmental testing of our work sites before we moved into any

work site areas. We hired industrial hygienists to give us advice on what personal protection we should use. We had all of our people vaccinated with hepatitis A and B and gave tetanus and diphtheria shots. We even hired security guards to protect our people from the sniper activity encountered at some job sites in and around the areas where we worked.

In the early days, we were ready to start on little more than a handshake. We did not demand the time we would normally take to scrutinize contractual terms and conditions, nor did we dwell on the risk of tort litigation. We knew that the trial lawyers were out there, but we simply could not take the time to imagine that someone would sue us for trying to save the city. The only risk in our minds was the risk that New Orleans would simply cease to exist.

Now, however, we wonder. Do we risk tort litigation over the actions we have taken and continue to take? Will the trial lawyers really sue us simply for trying to put our community back together? Some people disagree with the contracting regulatory agencies and believe that the agencies are not doing enough. Would such people actually sue us simply for following the Agency's instructions and relying on their conclusions?

We understand that the contracting agencies have to guide and direct the recovery effort. If we fail to follow their instructions, we expect to have a problem. We also have to answer to the regulatory agencies if we fail to comply with their standards. We expect them to take some kind of enforcement action. The problem is that we cannot be sure that the agencies are in charge, that the problem is in the future tort litigation could rewrite the rules long after the fact.

Boh Brothers has simply responded to the many requests that the Government agencies have made of our company. At their request, and as they instructed, we have for example made temporary repairs to New Orleans' flood protection system. These temporary repairs are intended to protect the city only for a short time.

As the Corps of Engineers and other Government agencies develop and implement permanent solutions to the many problems that Hurricane Katrina revealed, but we really do not know how much time the agencies will require, the time could stretch on into the 2006 hurricane season and beyond. If future hurricanes breach any one of these temporary repair locations, will the trial lawyers sue us, the Government Agency or both?

The exposure is real. Even if we are confident our work meets all relevant standards, litigation takes an enormous toll on a company, any company. The cost of litigation is enormous.

During the early stages of our recovery efforts, a lawsuit has already been filed, a meritless class action lawsuit was filed against us in the first few weeks of our recovery efforts. We were sued on a project we did not even do. We were sued allegedly for performing work on a bridge that was near the breach of the 17th Street Canal. We were not the contractor that did that. The attorney did not do his research, did not attempt to do any research. He sued the wrong company that was doing the work, wrong name, and he just assumed that Boh Brothers had to be involved in the construction of that contract, therefore he sued us in a class action suit.

We immediately wrote him a letter demanding that he dismiss the lawsuit with consequences of defamation of character, defamation of reputation, rather, and sanctions under the law in Federal court and give an apology for going into the newspaper and the press, television station, and announcing that Boh Brothers was responsible and sued for the breach in the 17th Street Canal when we were there fixing the breach and fixing all the breaches and bringing the city back to recovery.

I am not here to bash plaintiff attorneys. My wife works for plaintiff attorneys. We are still married, and I have been married to her for 35 years. So I am not here to bash plaintiff attorneys.

When asked to do the right thing for New Orleans and its residents, Boh Brothers responded. Now it is time for Congress to do the same. Now it is time for Congress to give the contractors working hard to revive New Orleans and the remainder of the Gulf Coast some reasonable measure of protection from unlimited tort liability, simply for being there to meet the need. Congress should quickly enact S. 1761.

Boh Brothers is a member of the Associated General Contractors of America. I can assure you that responsible contractors throughout the Country are paying close attention. They are aware of what has happened to the contractors who responded to the terrorists attacks in New York. They are aware of the litigation that followed. They are responsible corporate citizens, but they are deeply concerned.

In closing, let me just add that the greater New Orleans area requires your particular attention. It heavily depends, for its very survival, on the design and construction of the flood protection system. For itself, its employees and its community, Boh Brothers also urges you to quickly provide enough funding to design and construct a flood protection system that will protect the city from future hurricanes.

In our opinion, if proper funding is not quickly provided, many of the city's residents will never return or rebuild, if they do not have the confidence that this won't happen again. Thank you for allowing me to provide Boh Brothers' opinion.

Senator THUNE. Thank you, Mr. Perkins. I appreciate it. I have been fairly lenient with the gavel, because I think all your testimony is very pertinent and obviously deeply felt, based on what many of you have experienced there.

I do want, if you can, your entire statements will be included as part of the record. If you can keep them down to the 5 or 6 minute level, it will be very helpful, because we are going to run out of time for our last panel.

Senator Boxer has a commitment at 4 o'clock. So what I would like to do at this point before I ask Mr. Feigin to offer his testimony is, she has a question that she would like to direct, one, I think to General Riley, and then perhaps to those of you who have already testified on this panel. Then she will have to duck in and out.

Senator BOXER. Mr. Chairman, thank you. It is such a tough day and the panel has been so very respectful of our situation. We are very respectful of yours, and we are just not in control of the voting today.

I want to say that I heard just two witnesses here today and I think they are both very eloquent. I missed the Army Corps, and I did have a question, sir.

We have been in touch with you—staff to staff contacts have been made—because when the Senator introduced this bill, we said, is there a problem? Are you having problems getting the contractors to sign up? Dr. Wright points out that, she said there was a near riot for people trying to get these contracts. Are we having a problem? Are contractors staying away because they are so nervous about their liability issues, in your opinion?

General RILEY. Ma'am, that is sort of a mixed bag. If you look at the history of our contracting during Katrina, early on we went to contractors, like Mr. Zelenka who sits here, with a call and a letter contract. We knew he was there and available, then we also looked for a contractor to do un-watering. We called four different large contractors that could do that quickly. One was available and responded.

For the largest debris contractors, we advertised and we got 22 respondents for those 4 contractors. However, just in the last few weeks, we had a contract out for levee repair, five different contracts; on one contract we had four bidders, on another contract, we had two bidders, and on three of them, we only had one bidder. I don't know the reasons, you would have to ask the contractors. It could be their crews had homes damaged or they just weren't available, they were too far away, or they considered the risks. I just don't know. I think the contractors would be better to answer that.

Senator BOXER. We talked to Colonel Doyle. Colonel Doyle told us that he never, he didn't see any problem whatsoever. We will have to work further with you, maybe get some more—I mean, there are certain areas where you are looking for some specific skill, I would assume, right away, your universe is smaller.

Everything I hear is the opposite, that the contractors who were displaced and, unlike Mr. Perkins, who worked in the area of, and I am sure Mr. Zelenka, are you from the area as well, sir?

Mr. ZELENKA. Yes.

Senator BOXER. For many years, since the 1800's or something. I mean, there are still a lot of folks that are complaining that they are not getting the contracts.

So I will keep on evaluating this, we will get something in writing. The question, Mr. Perkins, I think it is so funny that you are married to someone who works for a trial lawyer. Because you mentioned trial lawyers are at least five times. You said trial lawyers are coming around and looking to sue. The last I knew, trial lawyers represent injured parties. That's OK, I mean, I didn't think they can come around unless they have injured parties. But that's OK.

I am married to a lawyer, my son is a lawyer, my father was a lawyer. I am not. So I could be wrong on that. I don't think trial lawyers can get a case brought unless they have a party. No. 1, did you ever see the movie Erin Brockovich?

Mr. PERKINS. Yes, ma'am.

Senator BOXER. I think, from what I hear from you, you say that some foolish attorney brought suit against the wrong company, right?

Mr. PERKINS. Right.

Senator BOXER. That's outrageous, and of course, that suit isn't going forward against you, is it?

Mr. PERKINS. Not after we made the demand that we were going to come after him for sanctions and he realized that we were not the contractor. The point is that it was a distraction and a wrongly filed distraction. He didn't do his homework. That's the kind of things we get faced with. We are doing temporary repairs here. We are not hearing anything about what the permanent repairs are going to be. How long those temporary repairs are going to stay there. So we are exposed to hurricanes.

Senator BOXER. Would you rather not—I mean, if you were faced with this, suppose this committee decides, and the Senate decides, that we are not changing the rules, that we really think that having laws that are reasonable are a deterrent to some of the bad actors? I am assuming those of you here are good actors, you are good actors, you have been in the community, the last thing you would ever want to do is hurt anybody.

All you have to do is be alive through our history and see what people do to other people. I'm saying, if you play by the rules, somebody makes a mistake and comes after you, you have every right to be upset about it. Why the heck would we change the laws of this Country to let the bad actors off the hook? Because you're going to be taken care of.

Mr. PERKINS. Senator, with respect to the Corps of Engineers, they have immunity. We are asking for some protection ourselves.

In my opinion, there is just as much of a likelihood, and perhaps more, that the Corps of Engineers and the design that they provide and the supervision that they provide as well on the job site is potentially the problem. Yet we get to be the scapegoat and we get the suits, and we have to spend the costs on attorneys and expert witnesses and all the things that——

Senator BOXER. Well, wait a minute. Who is suing you now?

Mr. PERKINS. Nobody is suing me now. I am concerned that I am doing temporary repairs and we are out there responding on a handshake and a prayer. Those temporary repairs are not meant to withstand hurricanes of the nature of Katrina or probably well below Katrina.

If the temporary band-aid is not permanently fixed, who are they going to sue? If the breach occurs at the temporary location——

Senator BOXER. Well, I'm assuming—sir, I'm assuming, because I've read all about this, that there is a clear understanding with the Corps that we are doing these temporary repairs. Everybody knows we are not doing permanent repairs, sir. So I would assume that you would have a good lawyer who is going to look over the contract and you are going to be just fine. That's how the system works.

My understanding is that you were involved, your company, in writing this legislation, is that correct?

Mr. PERKINS. Our company?

Senator BOXER. Your organization, the trade association, was involved in putting together, drafting this legislation?

Mr. PERKINS. The AGC, yes.

Senator BOXER. Who was at the table? Was Dr. Wright at the table to speak up for the victims who might have a problem in the end?

Mr. PERKINS. I don't——

Senator BOXER. Do you think your company would have a problem meeting a negligence standard?

Mr. FEIGIN. Senator Boxer, may I say something?

Senator BOXER. Just a minute. I just want an answer. Do you think that your company would have a problem meeting the current negligence standard?

Mr. PERKINS. The problem is that the work that was asked of us had no specifications, had nothing to rely on, no design specifications, no specifications whatsoever. We were called out to respond and through our efforts, we recovered the city, stopped the breaches. We did it in record time.

Senator BOXER. OK, well, you know, Mr. Chairman, maybe what we should be doing is looking at the contracts the Corps get for these temporary repairs and if we've got a problem with the temporary repairs, and people are fearful they are going to be sued for the temporary repairs, that is one set of circumstances. I think everyone is willing to look at that.

But this legislation goes far, far, far beyond that, way, way, way beyond that. It looks to me, you know, call me old-fashioned, but I've been around here long enough to see that when there is an excuse to change a law you don't like, you go far beyond it. Not you personally, sir. We just keep seeing this again and again. We have an issue, we have an issue with oil prices. So now we're faced with, oh, well, let's give land to the oil companies. The oil companies are making record profits.

This is not the way to respond to Katrina. I just look at this and I say, this goes far, far beyond any reasonable fear that you may have as a solid company. I think the protections that are granted in this go way beyond the circumstances you are describing. If my chairman wants to talk about narrowing the scope of this bill to these areas where you may well have a legitimate point, I'm very open to that.

What I'm not open to is changing the law, not only for this situation, but every other "emergency" situation where there's $15 billion or more in Federal expenditure. This thing is way beyond just protecting you from a band-aid type of situation, which I agree with you, that's what we're begging you to do and help us to do to give us a modicum of protection now until we get our act together and figure out what's the long-term solution.

So maybe there's something here, Mr. Chairman, where we can focus on a legitimate issue without, you know, trial lawyers this and trial lawyers that, and trial lawyers are working, you know. Give me a break. You say you're not bashing trial lawyers. Read back what you said. Because at the end of the day, that's what this comes down to, another excuse to weaken the laws, and as far as I'm concerned, it's wrong.

You want to do something narrow, but when a group of contractors get together, help write a bill, and we don't have anybody from the public—excuse me, the victims, the public sector who care about environmental justice, who care about victims, not at the

table, seems to me you're presenting a one-sided deal here. It's sad. Because if you had called Dr. Wright or other people to the table or maybe the folks from New York who went through this situation, maybe you'd have something here that we could do together instead of always having to battle it out.

Mr. FEIGIN. Senator Boxer, may I say something?

Senator BOXER. I think I've spoken long enough. I would be delighted to hear from you, sir.

Mr. FEIGIN. You haven't heard my testimony, but I would just like to respond quickly.

Senator THUNE. Yes, hold on, just before you do that, I want to take you up on that offer. If you want to provide some protections for temporary repairs we would be happy to work on that.

Senator BOXER. Yes, absolutely. I'm happy to look at that.

Senator THUNE. I do, in fairness, too, the bill is narrow in scope, it is narrowly drawn. I think it's unfair to characterize—a lot of the people at this table are also victims. These are people who I think care passionately about their fellow Louisianans and Mississippians and others who were victims of this disaster.

So I don't think characterizing them as somehow not sympathetic to the needs of the people that they live with——

Senator BOXER. Well, let the record be clear here, OK? I love everyone at this table, it's nothing about that. It's about what we're doing when we write laws that are too broad. Mr. Chairman, I have legal experts who have read this who tell me that you are protecting people from negligence. It's not your intent. You said that. But there's interpretations that would go that way.

For example, if somebody came in to clean out, to haul away a big bunch of barrels that are sitting out there and they don't look at what's inside, they think one thing's inside but they don't test. Turns out a barrel is punctured, some of the most toxic liquid gets into the water supply, off the hook, according to the legal people that I have talked to. So let's try to find some common ground.

I'd love to hear from you, sir, if my chairman would allow it, then I've got to—I'm like really behind, so I've got to——

Senator THUNE. Mr. Feigin.

Mr. FEIGIN. I know you have to run, but I didn't want you to leave without hearing a couple of things from the contractors that have actually been through it.

Senator BOXER. Yes.

Mr. FEIGIN. Right now, currently pending against the contractors who were down at the World Trade Center site, there are 5,000 claims. The problem isn't that we don't believe that we can sustain a standard of negligence. We believe that we've done nothing wrong. We are actually very proud of our safety record down at Ground Zero. Nobody got hurt while we were down there, there were no deaths when we were down there in one of the most difficult circumstances that anyone in the construction industry has ever faced.

But we are facing 5,000 claimants. The legal fees alone to defend——

Senator BOXER. Against how many companies?

Mr. FEIGIN. Against 140 companies.

Senator BOXER. These are individual suits?

Mr. FEIGIN. They are all individual suits. It has not been certified as a class action.

Senator BOXER. OK, well, fine. I think Dr. Shufro has some information on that. I'm aware of his testimony.

The point I want to make is 5,000 people have sued. It's not a class action.

Mr. FEIGIN. It has not been certified as a class action.

Senator BOXER. Right. Well, I understand that.

Mr. FEIGIN. The legal fees alone in defending our position, we feel we will be exonerated in the end, because we don't feel we did anything wrong. The legal fees alone could put a company like ours, as big as we might be, out of business. Then the plaintiffs are left with nothing. There's nobody to sue, there's no money to get anywhere.

So I'm not sure—I support this bill because I think it provides some kind of relief for the contractors. I would just like some acknowledgement that the contractors need some kind of relief in situations like this, and all you are really talking about are details.

Senator THUNE. I think it was recognized in the aftermath of 9/11 that there was a need for that, because a pool was created to provide some help.

Mr. FEIGIN. Well, we tried to get the legislation that Senator Boxer refers to, legislation that would help us, and we couldn't get any legislation. So what we ended up with was a billion dollars to start an insurance company. The experts say now that maybe a billion dollars won't be enough. Then we will be right back where we started right after 9/11.

Senator THUNE. Well, let's—Senator Boxer had to leave us for a while. But let's move on, Mr. Feigin, with your testimony and Mr. Shufro, with your testimony. Then I have a couple of questions I would like to ask as well.

STATEMENT OF MICHAEL FEIGIN, EXECUTIVE VICE PRESIDENT, BOVIS LEND LEASE HOLDINGS, INC.

Mr. FEIGIN. If I have to keep it under 5 minutes, I am going to read my testimony, but it might be a little repetitive of what I just said.

Mr. Chairman, I would like to thank you, I would like to thank Senator Boxer and the committee for inviting me to participate on today's panel and allowing me to discuss my company's experience after the terrorist attacks on 9/11.

The proposed legislation, S. 1761, addresses some of the problems following Hurricane Katrina. I hope to use the knowledge we gained through our 9/11 experience to draw parallels to Katrina and future disasters and encourage the committee to take into consideration the role private business has played in helping Government with disaster relief.

At 1 o'clock p.m. on September 11, 2001, hours after the first attack, Bovis received a call from the city of New York. The city wanted Bovis to come to what was being called Ground Zero to help manage the daunting task of making sense of the chaos in an effort to save lives. Without a moment's hesitation, Bovis went to help.

The initial Government estimates were that the recovery efforts, debris removal and site stabilization would take 2 years and cost over a billion dollars. The work was actually finished in 265 continuous days, working 24 hours a day at a total cost of somewhere around $500 million. Bovis was particularly proud that we had no fatalities and only 36 reportable accidents with over 3.2 million manhours worked.

No consideration was given by any of the contractors to liability issues or potential claims or lawsuits before beginning work after September 11th. When asked to perform work on any other project, any one of these contractors would have been given the time to properly analyze the situation, the risks associated with the assignment and the methods to manage those risks. The contractors also would have determined how to insure whatever potential liability might arise.

There was no time to do this before starting work at Ground Zero. It soon became apparent that the liability issues would have to be addressed. However, given the dangerous conditions, the retroactive nature and the unknown aspects of this unprecedented effort, commercial insurance companies would not provide the coverage needed, and ultimately only limited liability coverage was obtained.

After many months of work we received a commitment from Congress to fund a captive insurance program. This WTC captive provides coverage for the city of New York as the named insured and all the contractors, subcontractors, architects and engineers working at Ground Zero as additional named insurers. The policy currently has approximately 140 additional named insurers.

The captive was funded at a billion dollars because this was the quickest agreeable amount to get a program in place. Some now claim that even the billion dollars may not be enough.

Today there are claims against the contractors from over 5,000 individual claimants. These lawsuits claim existing respiratory and related injuries, or fear of such injuries in the future arising from or related to the debris removal work. The captive is vigorously defending these lawsuits.

Bovis did receive compensation for its work at Ground Zero. For the WTC captive, however, expenses for lawyers and consultants would have exceeded any fees made in a matter of months. As a result of these ongoing expenses and potential liabilities, we would probably lose our bonding lines, our banking support and our current insurance coverages. In short, absent the captive, responding to a disaster when called would have taken a thriving business employing over 2,500 people in 20 States and Latin America and put us out of business. We put our business, our livelihood and our families' prosperity on the line to help people and do the right thing.

If asked again, we owe it to our company and our employees to think very hard about what our response should be. While we think existing law offers a shield in this area, the current World Trade Center related litigation demonstrates the need for additional clarity, not only to protect contractors from liability, but also to eliminate or discourage the costly and time consuming process of the litigation itself, except in appropriate circumstances. Protec-

tion from liability needs to be put in place to eliminate any question of response and to avoid penalizing companies that come when called and do the right thing.

S. 1761 does this and should be supported by this Committee. Mr. Chairman and members of the committee, thank you for the opportunity to speak about our experiences down at Ground Zero. You have our written testimony and I will answer any questions you might have.

Senator THUNE. Thank you, Mr. Feigin.

Dr. Shufro.

STATEMENT OF JOEL SHUFRO, EXECUTIVE DIRECTOR, NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY AND HEALTH

Mr. SHUFRO. Thank you. My name is Joel Shufro. I am the Executive Director of the New York Committee for Occupational Safety and Health, NYCOSH, a non-profit educational organization dedicated to every worker's right to a safe and healthful workplace.

We have a 26 year history of providing quality safety and health training and technical assistance to working people, unions, employers, Government agencies and community based organizations about how to recognize and eliminate workplace health hazards. Since the attack on the World Trade Center, NYCOSH has had extensive involvement with workers who participated in the rescue, recovery and cleanup operations at the World Trade Center site, workers in offices surrounding Ground Zero, immigrant workers who cleaned offices and residents, utility workers who restored essential services to the area and residents living in or returning to contaminated homes around Ground Zero.

To those involved in the rescue and recovery and cleanup, working at the World Trade Center was more than a job. Those who responded to the disaster did so for many reason: patriotism, altruism and humanitarianism, among other motives. They responded to the needs of their Country, many working 12 hours a day, 7 days a week for months. They assumed that if they were harmed as a result of working at the site, their medical needs would be taken care of and their families would not be driven into poverty. They believed that they would not be forced to give up their homes and that their children would not have to drop out of college so medical bills could be paid.

Unfortunately, 4 years following the devastating attacks on the World Trade Center, respiratory illness, psychological distress and financial devastation have become a new way of life for many of the responders, office workers and residents in lower Manhattan. According to the Centers for Disease Control, workers and volunteers who worked at the World Trade Center site continue to experience high rates of respiratory problems, sinusitis, laryngitis and higher rates of lower respiratory problems, asthma, bronchitis, chest tightness, coughing and wheezing.

Many of the workers are disabled by chronic pulmonary problems. Some are unable to work. Many have also suffered substantial economic disruption of their lives because of World Trade Center related problems and do not have health insurance and are unable to pay for treatment or needed medicine. As Dr. Robin Herbert, co-director of the World Trade Center Worker and Volunteer

Medical Screening Program at Mt. Sinai, testified in front of Congress, there are grave concerns about the potential for workers developing slower starting diseases, such as cancer, in the future.

For many coming through the screening program, the World Trade Center screening program, the fears of future catastrophic diseases like cancer, which can take as long as 20 to 30 years to show up, loom as large or larger than their acute ailments. These concerns have been heightened by the recent passing of two New York City emergency technicians whose deaths have been related to illnesses resulting from exposure to toxic substances at the World Trade Center.

Rather than make a stronger commitment to protect workers and residents from environmental and occupational hazards in future disasters, S. 1761 would free contractors from most liability for personal injury claims when engaged in responding to a major disaster, such as Katrina, as well as from citizen suits under Federal environmental laws. We believe that such legislation would undercut any incentives contractors have to comply with safety and health environmental regulations.

Federal contractors who are paid by the taxpayer for the work that they do should be held fully accountable to the public if they behave carelessly or cause harm to people or the environment. No public policy reason justifies a taxpayer subsidy for negligence or illegal activity. What S. 1761 does is to shift the costs of personal injuries and property damage from the Government contractors to the workers and/or the residents in the disaster areas.

It is imperative that workers know that if they come to the aid of their Country, as the contractors, and are injured or contract an illness in the process, their medical needs will be taken care of and that their families will be secure. They need the guarantee that contractors who do not act responsibly will be held liable.

Responsible Government contractors should have no need of the sweeping immunity this bill would provide. We urge you to oppose the legislation which would provide a windfall to irresponsible contractors at the expense of public health and the environment.

Senator THUNE. Thank you, Mr. Shufro.

Let me just ask a couple of questions, if I might. Just incidentally, for the record, too, the legislation does not exempt any contractor from labor, environmental or safety laws. They have to apply to those. It is a narrowly drafted bill which provides some protection so that we are able to get, as the Corps mentioned, when they need on short notice someone to come in and do the kind of work that assists in the recovery, assists in the debris removal, and again, there are five criteria here or five conditions under which this bill would apply. It is narrow in scope.

Having said that, you raised some questions about people who are injured, and I guess I would ask the question of some of the contractors who are here, do you all carry workers comp insurance for your employees?

Mr. PERKINS. Absolutely. It is required by law.

Mr. ZELENKA. We carry it, too. If I could, for a second, in listening to Dr. Shufro's testimony, we are not trying to get away from liability caused by our own negligence. In listening to what he was saying, it appears that the terrorist acts of attacking the World

Trade Center and all of the respiratory illnesses that it caused to everybody in Manhattan now should become the contractors' liability. Because we are the only person in there that can be sued. There is no Government Agency to sue for that attack, so everybody who got exposed to something now needs to be able to sue the contractor who was working on the job site.

We shouldn't have to assume the liability of the terrorist activity. We shouldn't have to assume the liability of what happened with Katrina just because we are the only people or the only entity involved in there that can be sued.

Mr. SHUFRO. I believe for the record that the city of New York is also being sued.

Mr. FEIGIN. The city of New York has a cap on its liability under the Airline Security Bill of $350 million.

Senator THUNE. That is, I think, a fair question, and Dr. Shufro, the implication that somehow the contractors caused the 9/11 contamination, I think you have to ask the fundamental question of who caused it, the contractors or the terrorists. I think most people know the answer to that.

Mr. FEIGIN. May I answer the question, Senator Thune? We have workers compensation insurance as well, but we also spend a lot of money on an annual basis providing additional medical coverages for our employees so that they don't have to worry about these things. So it is not an issue for us of being negligent on the job site. The issue for us is really, like I said before, trying to defend 5,000 different claims. The legal fees alone would put a company under. It's not a matter of worrying about being responsible or not.

Senator THUNE. Mr. Perkins

Mr. PERKINS. We're not afraid of negligence, either. The point is, he's not afraid of it, we're not afraid of it, he's not afraid of it, the point is the cost. He is talking about the cost. We go to trial all the time and we protect ourselves and we win cases on negligence. It's not about that. It's about the fact that you have to go through this long, drawn-out process before you are able to prove yourself not to be negligent.

The fact that a Corps of Engineers job is designed, supervised and accepted by the Corps you would think would indicate that there is no negligence. If we get sued, we have to go to court and prove it. We have to spend the money to prove it, when we already have a stamp of approval by the Corps of Engineers who accepted the job. That's the point.

Ms. WRIGHT. May I speak?

Senator THUNE. Dr. Wright.

Ms. WRIGHT. I think that our concern is based on something that we are already seeing in New Orleans, and that is that contractors are hiring people and giving them a 20-minute class in the proper gear to wear when they are doing the kind of work, like debris removal and things of that sort. Twenty minutes, and then telling them where they are going, they don't need any equipment. So people are being exposed every day, workers are being exposed every day.

As it relates to the hassle of dealing with the legal system in this Country, I think that the average citizen would tell you that it is

a hassle for us, if you are trying to buy a house, for example, is what happened to me, and someone with a similar name ends up on your report. So when you go to closing, you can't close, first you have to prove that it's not you. By the time you finish all of that, the interest rates have gone up. I mean, it's not just the companies that have hassles dealing with our legal system.

I can't go and say credit bureaus need to be destroyed because they actually caused me to lose a house that my family wanted, because this is the way the system is. There are lots of things that need to be fixed, and maybe there are some ways that companies can be helped.

I'm really a bit disturbed by the fact that companies want the Federal Government to give them some special leniencies or special protections. The average citizen on a daily basis, all of the people dealing with the insurance companies right now and the things that we are having to go through to get the insurance that we deserve for paying premiums for all of these years, what should I say? Well, you know, insurance companies shouldn't have a right to closely examine the damage that occurred by Katrina, they should give me all the money that's in my policy. Now I have to sit and wait and go through the process.

My understanding is that companies generally pass on the costs of whatever their legal fees are to the consumers. I expect that will happen with these companies. I also believe that if a company ends up going out of business because of 9/11, they will very quickly open under a different name, at least that's been my experience, startup shop, they already have all of the relationships with the Army Corps, and that business is up and running very quickly.

I don't think we should throw the baby out with the basket. Try to fix the problem, but this law is wrong.

Senator THUNE. Dr. Wright, are you aware, though, of any Louisiana workers that aren't covered by workers comp?

Ms. WRIGHT. I can't speak to that. I don't know. I believe that some of these laborers that are just being picked up to do debris work by these contractors are not covered. They have no coverage at all.

They are also doing things like group hire, where the person who has the crew to go in and do the work is in fact paid a particular amount of money. We have undocumented workers like you wouldn't believe in the city of New Orleans. You don't see white or black workers. All we see are Mexican workers. Many of them are undocumented.

This is not a slap in the face to the poor Mexican workers who are also being extremely exploited. I am concerned about their health, too. They are not wearing any kind of protective gear doing the kind of debris removal that we see going on in the city.

I invite you to come down and just observe what's happening in the city as it relates to that.

Mr. SHUFRO. In New York City the workers who were cleaning up the office buildings surrounding Ground Zero were for the most part immigrant workers. My organization placed a screening van about a block away from the Ground Zero. We saw 410 workers. Four hundred ten of them had respiratory problems. Four hundred ten of them, if they were lucky, got a paper mask, which was not

sufficient to protect their health. Most of these were, all of them were immigrant workers. While they are eligible for workers compensation in New York State, because most of them are what are called medical only cases, there is no wage loss in many of these cases, they can't get legal representation, and going through the system is virtually impossible without a lawyer.

We have examples of people in New York City who are today, years after filing their case, still haven't received a dime from workers compensation. The cases are contested, fought through, and people who worked on the pile are being denied their compensation. I can go through people who have lost their houses, kids who have dropped out of college because their parents can't—their father or mother, actually, have not been able to pay medical bills.

The system hasn't worked, and all the workers are asking, the same thing that the contractors are asking here, but in reverse. They want to know that if they go out and cleanup and come to the aid of their Country in a disaster situation that they are going to be taken care of. That's what this bill will not allow.

Senator THUNE. One final question, and I guess it relates to the complaint that's leveled that this legislation would eliminate any incentive for contractors to do good work. How do you respond to that?

Mr. FEIGIN. Can I answer that? This is no insult to the plaintiffs bar, and I am an attorney. We don't sit in our offices worrying about lawsuits being brought by the plaintiffs bar against us, because we are doing our work. We don't worry about the nuisance of being in court all the time, and we successfully defend those lawsuits.

This is a unique situation, unprecedented in the history of America, that required some unprecedented results. From my perspective, our company doesn't think about any—we go beyond what OSHA requires us to do to keep our contractors safe on our job sites. We do that because we are in the business of keeping people safe.

So we are not going to sit here and say that because somebody passed a bill that may apply twice a decade to a job that's so big and so unprecedented that it requires that kind of—we hope we never have to ask for the help that this bill gives us. Having gone through this, something like this really is necessary. It may not be this, maybe it's something else.

Some kind of relief is necessary to make sure that contractors respond, qualified contractors who are interested in their workers' safety, who have the kind of high standards for worker safety that companies like ours and Boh Brothers and the subcontractors who are here today have. We want to make sure those are the companies that go to ground zero and go to these disasters, but if these companies are out of business, the companies that are going to be going are the ones that may not care so much about this.

From our perspective, safety is our No. 1 concern. It is a core value of our company. We actually go beyond many OSHA requirements for the safety of our people on job sites.

Mr. ZELENKA. As a small business, we don't have much ability to fight claims. It wouldn't take much to put us in an uninsurable

position, in that insurance costs could get so high that it wouldn't be feasible for us, we could not maintain our business.

But you don't work to different levels as you go to different jobs. We perform at the best level we absolutely can perform at on every job, not just on the quality of the work we do, but also the way we approach safety. Our employees are the single biggest asset we have. I assign a senior, a junior and a third check. We are a family business. We have been involved for generations, our employees have been involved for generations. We are not going to do anything to put anybody at risk just because we may perceive the law is more lax. Everything is going to be done to the same level.

Senator THUNE. I'll tell you what. Senator Boxer has a question she wants to ask. I have more than used my time under this round. Hopefully I will have a chance to——

Senator BOXER. Maybe we can hear the next panel before we vote.

Senator THUNE. If we could ask the third panel to come up, what we may do, if you all could hang here for just a minute, is we will get a chance to ask questions.

Senator BOXER. Then the third panel can jump in and we can hear you before we run to the floor for a series of votes.

Let me just say, because I have a lot of questions, I am not going to ask them now because of the timeframe, but I would like to submit them if that's OK with you, Mr. Chairman.

Senator THUNE. Without objection.

Senator BOXER. For me, the issue is, what is the problem? We need to document what is the problem. That means looking at the whole picture. At the end of the day, what's the best thing to do for the community, for the people of the community, and what's the fair thing to do.

Now, my understanding of life is that if you do the right thing, we have a court system that at the end of the day is fair. It is true that when you are sued, it's an awful experience, it's awful for every party, because they all put money on the line, they may never recover it. Depending on your point of view. If you are a big company and you keep a full-time legal staff, it's a heck of a lot cheaper than if you're a plaintiff's lawyer who is representing a bunch of poor people and they may never get their case certified.

So don't try to pull the wool over anybody's eyes. We know there's frivolous lawsuits. There are laws against that to get the suit thrown out. Then there are the cases, and I go back to Erin Brockovich, who I happen to know, where chromium 6 got into the water, no one did anything about it, and people died. Children died, people died.

Finally, these people were held to account and thank God for that. In a lot of these cases, people don't act. They are not good actors. They are bad actors. They are bad actors, whether, you can go back to the Edsel car, you can just do a lot of things where people knew. It wasn't the Edsel. What was the car that had the—the Pinto, where they knew that, they wrote into the cost of doing business, as Dr. Wright said—X number of lawsuits a year. Because they made so much money. It came out at discovery.

You can shake your head all you want. You're a good actor. Hopefully you would never do that.

Mr. FEIGIN. That's not the point, Senator. It's not the point.

Senator BOXER. I'm not asking you a question. I'm talking.

The fact is, there are bad actors. You have to be very sure when you write legislation like this, and you said it's only for big disasters, $15 billion, I don't want to say anything, is in my State not a big disaster. It happens, sad to say, very often. Earthquakes, floods, fires, drought, and all of a sudden, you want to do a narrow bill, and all of a sudden you are finding out you're changing the law for certain people and not for other people?

How is that equal protection under the law? How is a person who is victimized by a bad actor in the case of Katrina, none of you at this table, some bad actor who comes in and victimizes people, and how does that victim feel? Are they getting equal protection where they may get cancer or some awful thing because some contractor didn't do the proper testing that was required? At the end of the day, that's not right.

So if there's a problem, Mr. Chairman, let's narrow it down.

I have one question for Dr. Shufro. I just want you to tell me in human terms, if you can, in your experience, because we have to say, although this was a natural disaster compared to a terrorist attack, do you, could you describe the kinds of injuries that you have seen and what might have been prevented if the contractors had done the right thing there? Can you give us a couple of examples?

Mr. SHUFRO. The most prevalent disease seen by the Mt. Sinai Worker and Volunteer Screening Program is respiratory problems. This could be prevented through respiratory protection.

On a good day, and you can correct me if I am wrong, according to OSHA statistics, workers on the site at Ground Zero, it was never more than 50 percent, never more than 50 percent. That meant at least 50 percent of the workers were working among toxic substances unknown, and a lot know, but also unknown, without appropriate protection.

Mr. FEIGIN. May I correct you now?

Mr. SHUFRO. Let me finish.

So all of that could have been protected, and on——

Senator BOXER. Are you saying on a good day half the people working on the site were not properly protected? Is that what you're saying?

Mr. SHUFRO. That's what I'm saying. Fifty percent were not wearing respiratory protection at any given time. There were days that it was below that, very few above that. At a different site, at the landfill, you had 85 percent respiratory protection. So you have clearly a management problem, it seems to me. If you are able to enforce 85 percent at one site and 50 percent at another, there is something that's going on at these two sites that's different.

Had you had workers who were wearing their protection, we would not have seen the high rates, and we're talking about thousands of workers who are sick today as a result of exposure.

Senator BOXER. I think Mr. Feigin wanted to say something.

Mr. FEIGIN. Yes, if you don't mind.

It is interesting, were you down at the site ever?

Mr. SHUFRO. Yes, I was down at the site.

Mr. FEIGIN. Then you know that on the site there was a perimeter set up by OSHA on the site. Nobody was allowed inside that perimeter without the appropriate respiratory protection, and there was appropriate training and fitting and baseline testing of everybody who went within that protected area.

So everybody had the appropriate respiratory protection. Also, there were not just construction workers on that site, but there were many police, fire workers on that site over whom the contractors really had no control. So it would be interesting to kind of look at the detail of what that 50 percent number is, whether they had it and simply refused to wear it, or whether they didn't have it at all.

The other thing, too, over at Freshkills, which is where we brought the debris, I think if you look at percentages, it is interesting, but you've got to look at what the total number of people were, because you had 1,000, you may have had 1,000 workers at Ground Zero, you may have had 30 people over there. So it's not a lack of supervision or management, it's a lot easier to manage 80 people and require them to do something than have 1,000 people and require them to do something.

Senator BOXER. Dr. Shufro, did you want to respond?

Mr. SHUFRO. You know, it well may be that people were provided with protection and weren't wearing it. That is a management problem. If people are doing the job improperly and not wearing their protection, then there is something the matter with the management of that site.

Senator BOXER. Mr. Chairman, others may like to comment on this.

Mr. PERKINS. I just wanted to comment on a couple of examples related to Erin Brockovich and the other example you used. I don't think this bill protects us from that type of——

Senator BOXER. I know. We have a disagreement. My lawyers tell me it's broad, sweeping. The Chairman says it's not. It's very narrow.

Mr. PERKINS. Those two examples were reckless——

Senator BOXER. So we need to talk. We need to sit down.

Mr. PERKINS [continuing]. willful misconduct types of situations.

Senator BOXER. We need to talk, because we read it differently. I think it was written by the industry. I mean, let me put it this way. I'll restate that. I think it was written with the advice and counsel of the industry, and I don't think anyone from the other side sat at the table.

So you can have an argument, you know, the best legislation I've ever written calls in everybody from all sides. I just let them sit there and argue with one another, well, we meant this, well, we didn't mean that, we meant that, we meant this. At the end of the day you come out, you get a bill that you can pass. I don't think a bill that could pass if it doesn't have everybody's advice and counsel.

Ms. WRIGHT. I just wanted to say that what I keep hearing, and I may be wrong, but I keep hearing all of these worries about companies going out of business, insurance costs being so high. I just want to say that the same thing is true for the average citizen when it comes to insurance, for example. If you get two claims with

your regular insurance company, by the third claim, you can't get insured any more.

So what is being put in place is another insurance pool, in Louisiana, where if you can't get insured because you have had insurance claims, whether it is by natural disaster, or just a pipe breaking, the insurance companies will not insure you. There is a Louisiana plain. That's where you go.

So I'm saying, why not the same answer that you've given for regular citizens then be given for companies under these extreme circumstances, not this kind of sweeping bill? So it seems to me that as Senator Boxer was saying, let's just figure out what the problem is and try to put some protections in. In that way, that protects everybody, and not just this sweeping bill that I think ultimately hurts the citizenry.

Mr. ZELENKA. There is no pool in there for insurance. As a small business, I sit here and listen to this, and I listen to you say, the courts will protect you and you will fight all your claims.

But I go back to once again, I won't survive as a small business if I have to continue to defend myself against claims that don't have anything to do with my negligence or my company's negligence, just the fact that I am the only easily suable entity in the loop here. I'm in there trying to do the right thing and be a good actor, and I'm the only guy that can be sued, so I have to defend myself from all these suits. Small business is going to suffer. All these businesses, as you talked about, wanting to get in line, they are going to suffer. Going out of business, declaring bankruptcy and popping up under another name isn't a very good way to do business. We wouldn't be around for over 100 years if we——

Senator BOXER. Well, Mr. Zelenka, for me as a U.S. Senator, from a State that has so many natural disasters, I don't even want to talk to you about it. I mean, it's just, every other day, we have so many happening. I work closely with my business community, with my unions, with non-union workers, with the immigrant community and everything else.

I want to help people who are caught in a situation where they are a good actor. I do not want to help people and send the wrong message that you can get a Government contract and then be sloppy, don't live up to the highest standard and all the rest.

Mr. ZELENKA. I agree with you.

Senator BOXER. If we could agree on that, it seems to me that we have some common ground. Nobody wants to see a good actor, a good business, a good citizen be driven out of business.

Mr. ZELENKA. That's where I'm headed.

Senator BOXER. Dr. Wright said, I think what she said was making an overture. She said maybe we need a fund where for these circumstances, where there is no blame, that we can have an insurer of last resort, kind of like the terrorism concept. I mean, there are ways that we can reach to help the good businesses.

Not to use this as an excuse to give some broad liability waiver to people who are not good actors and to people who are clearly negligent. Again, this isn't the chairman's interpretation, and I respect that. But we have a disagreement.

My lawyers have looked at it, his lawyers have looked at it. I think it's broad, it's sweeping, it will apply too often. It's a gift to

some potentially bad actor. It's an incentive for them not to do right by their workers, by the community, what do they care at the end of the day?

You know, these big oil companies now that were crying so much, oh, oh, it's a terrible thing, Katrina, we can't get the supply, it's awful, it's awful, it's awful, at the end of the day, they not only made more money than they ever made before, but they took bonuses that are so outrageous that the Republican Senate is having a hearing tomorrow where we are just going to come down on these folks.

So I think the American people are fair people. If you are good citizens, if you want to do the right thing, we don't want you to be hurt. That would be a terrible thing. At the same time, if you write legislation that you say is going to protect the good but takes away incentives for corporations to be good actors, you have done damage to the American family who is just trying to get up in the morning and not die of a heart attack or get cancer that's going to give them 20 years or have to wheeze their way through the day, as we have here.

I agree with Mr. Shufro, you give a worker equipment to protect himself or herself and they don't use it, you need to give a warning and then give a second warning and they're out. I have a rule in my office, no smoking. If anyone does it, you get a warning, then they're gone. They can go somewhere else that has a different policy, that's fine.

In any event, I've spoken too long. I just want to say, Mr. Chairman, to you, because we are friends and we work together, that if you want to take another crack at something that I think is addressing a real problem, I'm there. But if you don't, we're going to have a big, big debate over this. I think it's not going to lead to anything much, because I think you take Senator Clinton, Senator Shumer, who have gone through this stuff, and it's not like you're coming at this where there's no experience.

So anyway, I thank you very much for your allowing me to discuss this matter. I thank the panel, it's terrific.

Senator THUNE. I would expect you to disagree with me, frankly. I will say that part of this is based upon the experience we have been through in New York. I think lessons learned and trying to do something that is instructive that would apply to future, and again, bear in mind, these are $15 billion, which in California may not be as much money as it is other places, but that's still a pretty high threshold.

It is very narrowly drawn. The people who we are talking about here are people who are being asked by their Government to do this work. It's not like they are out there trying to profiteer from sweeping in on this disaster.

Senator BOXER. They're being invited.

Senator THUNE. A lot of these folks——

Senator BOXER. They're being invited. They don't have to do a thing they don't want to.

Senator THUNE [CONTINUING]. Are from Louisiana, too.

Senator BOXER. They don't have to do it if they don't think it's going to be worthwhile. This is a capitalistic system. We're not tell-

ing people, you have to do the work. We're saying, here is a contract, if you are interested, please let us know.

Senator THUNE. I think the concerns being expressed by the people who are doing that work is they may not do that work in the future if they don't have some protection from what now has turned out to be literally thousands of claims in the case of New York. I suspect we will see a considerable amount of that with respect to Katrina.

With respect to them being, just allowing them to be sloppy, this is all Federal oversight. If it's sloppy, it's because the Federal agencies that are overseeing this work are allowing it to be done in a sloppy way.

Just one final point on the question of jurisdiction. This Subcommittee does have jurisdiction on waste and disposal. I think it is important for us to be able to have a discussion about this subject, whether or not ultimately this bill is marked up in the Judiciary Committee or not.

I think we will release this panel. We have a vote on. How much time is left? How many votes, is it a series? Two votes.

Senator BOXER. Mr. Chairman, I just want to say, I got this from the Dolan Media News Wire. It says,

"according to the Louisiana Contractors Licensing Board, the number of applications for a contractor's license nearly doubled in September to 224 from a normal 120. In the first week of October, the number of applications increased an additional 300 percent."

I would like to put that into the record.

Senator THUNE. Without objection, that will be entered into the record.

Senator BOXER. Thank you.

Senator THUNE. We will take a brief recess to go and vote, and then, with the indulgence of our last panel, if their stomachs aren't growling too much, we will come back, I will get the testimony going and we will try and ask some questions of that panel as well.

So we will release this panel. Thank you very much for your testimony. Thanks for your responses to questions.

[Recess.]

Senator THUNE. Is everyone still awake out there?

We have returned. I want to ask the final panel to present their testimony. We will have a few questions. I don't think we are going to see Senator Boxer return from the floor. There will be another series of votes here before long.

In any event, I am very pleased and thankful for your patience, but very pleased to welcome Craig King, who is a Government contracts attorney; Professor Steve Schooner, from George Washington University Law School; and Paul Becker, who is President of Willis' Construction Practice to the hearing today. Mr. King, please proceed and thank you again for being here, and thank you for taking time and thank you for your patience.

STATEMENT OF CRAIG S. KING, GOVERNMENT CONTRACTS ATTORNEY

Mr. KING. Thank you very much, Mr. Chairman, and thank you for the invitation to provide testimony regarding Government contractor liability provisions of S. 1761.

There is a strong Federal interest in establishing appropriate standards for liability for Government contractors for actions taken in the exigencies of a disaster situation. Now, if you read the written testimony, it is clear that Professor Schooner and I diverge to some degree on this bill. So for purposes of my oral remarks, what I would like to do is really focus on those areas, those key areas where we do have some differences of opinion, and do so with all respect and admiration for the good professor.

At the core of the bill is the Government contractor defense. The defense was established by the Supreme Court and is part of the Federal common law of the United States. It provides that if certain requirements are met, a contractor stands in the same legal position as the Government, meaning that it bears no liability to third parties if the contractor does what the Government tells it to do in the contract.

Under Supreme Court standards, the Government contractor defense would apply to disaster relief efforts without S. 1761. Applying the Government contractor defense, however, would involve costly and unnecessary litigation, and what the bill does is add protections that will limit that type of wasteful legal process.

Go back with me if you will to 1988. In that year the Supreme Court decided a seminal case setting forth the Government contractor defense, Boyle v. United Technologies. In that case, the Supreme Court considered the effect on contractors of third party suits. It observed that if such suits are allowed, then the contractors have only two economically viable alternatives. No. 1, to not do the work, or No. 2, to raise the price to compensate for the legal risks. Either way, the Supreme Court said, the interests of the United States are adversely affected.

In his written testimony, Professor Schooner laments that he has seen no empirical evidence that contractors are refusing to do the work. The Supreme Court has the answer. There are only two economically rational options. If the contractors are doing the work, then the Government is under pressure to pay a higher price to cover the risks of those lawsuits.

But there are some complicating factors. We have heard about them today. First of all, there is the selfless desire of contractors to help, to do what's right. There is also the desire not to profiteer or be perceived as profiteering. Also in the Federal Acquisition Regulations, there are limits on price that keep, or at least put restrictions on the ability to act in an economically rational manner.

Consequently, the contractors are in a vise, and what's left for them to do is come to Congress and say, can you relieve the pressure, can you help us out of this situation. Now, the Government contractor defense is rooted in the Government's sovereign immunity. Congress waived sovereign immunity of the United States when it enacted the Federal Tort Claims Act. It enabled private parties to sue the Government in certain situations.

In so doing, it exempted from this consent to sue the Government any situation where there is what the Supreme Court calls a discretionary function exercised by a Government official. So Professor Schooner has really two criticisms here. First he says if the parties can't sue the Government, well, they ought to be able to sue the

contractors. His complaint is not really about S. 1761. His complaint is that he thinks the Federal Tort Claims Act is too narrow.

He says the liability should be allocated to the superior risk bearer, and that is clearly the Government. The Government has the agencies that can really know about how to respond to a natural disaster, but then he reasons that the Government is immune from suit, so let's let the private parties go after the contractors.

The essence of the Supreme Court's Government contractor defense is that private litigants simply cannot get indirectly from the contractors that which Federal law prohibits them from getting directly from the Government.

Now, the second criticism of Professor Schooner is that the discretionary decisions in disaster recovery situations are made by contractors, not by Government officials. So he says the Government contractor defense should not apply.

To the contrary, the Supreme Court has found explicitly that the Government contractor defense applies in remediation situations, because in a contract for remediation efforts, for example, the EPA making decision regarding the cleanup of contaminated sites, these are discretionary Government decisions.

Really, the point is being missed. The key point is that the bill provides expressly that protections of the Government contractor defense will apply only where a Government official does indeed exercise a discretionary function regarding the work. The bill specifically provides a process for the Government official to review the scope of work in the contract and certify that that particular work is necessary to the disaster recovery effort. The Government official must determine that the work fits into any of five specific types of recovery work and that discretionary function requirement then is fulfilled by the certification process.

The bill provides then that with a properly certified contract, the elements of the Government contractor defense are deemed satisfied. What this means is that for contracts that are so certified, and that's a narrow group of contracts, for contracts that are so certified, there is no need to litigate regarding the elements of the defense.

Let me be specific about what that means. In Boyle, that is the Supreme Court case, the Court said that there are three elements necessary to apply the defense. No. 1, the first element is that the Government must approve a reasonably precise scope of work. That is fulfilled by the certification requirement. There is no need for cost of litigation about that.

No. 2, it says the contractor must perform in accord with that scope of work. There is nothing in the bill that provides any protection for a contractor when that contractor's conduct is outside the scope of work of the contract.

Third, the contractor has an obligation to warn the Government when the contractor knows about dangers that the Government is not aware of. The bill does not reduce in any way the contractor's obligation to warn the Government when the contractor has actual knowledge.

What the bill does is it enables contractors and the Government to get on with business and to go about the cleanup and recovery efforts where the risks are unknown and unknowable. Inherent in

the nature of disaster recovery is that many of the risks are indeed unknown and unknowable.

By deeming the Boyle elements to have been satisfied, a contractor can proceed with the disaster recovery efforts, can do what's directed by the Government, can do so in good faith, and that is the reasonable way to proceed in a disaster recovery situation.

Mr. Chairman, just to end, the bill is reasonable. It implements the requirements already set forth by the Supreme Court. There is a Federal interest in having the best Government contractors respond in these types of situations without reservation. A certification by a cognizant Government official does meet the requirement of a discretionary function and should not be second-guessed by third party litigation.

Therefore, State tort laws where third parties are enabled to sue contractors just because they were there should be displaced in the absence of contractor fraud, recklessness, willful misconduct. Contractors don't escape from their acts. They simply are protected in the way the Government is where they do what is right. The bill should be enacted.

Thank you.

Senator THUNE. Thank you very much, Mr. King.

Mr. Schooner, now you have a chance to rebut or refute Mr. King's testimony. Please proceed.

STATEMENT OF STEVEN L. SCHOONER, CO-DIRECTOR, GOVERNMENT PROCUREMENT LAW PROGRAM, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SCHOONER. Chairman Thune and members of the committee, I appreciate this opportunity to discuss these Government contractor liability proposals.

S. 1761, the Gulf Coast Recovery Act, is simply unnecessary. It would discourage responsible contractor behavior, and it would expose the public to unnecessary risk and harm. The bill asserts that the fear of future litigation and liability discourages contractors from assisting in times of disaster. At best, that's hyperbole. At worst, it's false.

We routinely hear apocalyptic tales of monumental barriers to entry that deter firms from seeking the Government's business. What we do not see is empirical data supporting the assertion. The absence of this support is palpable. Nothing suggests that any significant population of contractors refused to seek their share of the Government's $300 billion annual procurement budget. To the contrary, the best contractors, small and large, domestic and foreign, aggressively vie for this work every day.

Insulating contractors from liability improperly allocates risk of harm between the public, the contractors, and the Government. A better solution, and Mr. King mentioned it, is to allocate risk to the superior risk bearer, the party best positioned to appraise the likelihood that harm will occur, avoid the occurrence of the risk, insure against the risk, or bear the cost of the risk. What this bill does is allocate the risk of loss to the individual, the party least able to anticipate, assess, or avoid the risk, let alone insure against it or bear its costs.

Thus, the Government neither assumes responsibility for its contractors nor would it permit the public to hold the contractors accountable. In a responsible Government, protection of the public from harm, rather than the protection of the economic interests of contractors, must come first.

Now, the bill creates a rebuttable presumption that all elements of the Government contractor defense are satisfied. This turns the Government contractor defense on its head. Historically, the Government contractor defense insulated supply contractors that explicitly followed Government direction to their detriment. The defense does not protect contractors that exercise significant amounts of discretion.

Mr. King ignores the fact that when the Government rushes to identify contractors, hastily drafts contracts, and loosely manages those contractors, the Government abdicates, nay, delegates its exercise of discretion. Thus, in removing debris, a contractor faces significant economic choices. For example, drivers with spotless safety records probably demand higher wages. Newer, better maintained trucks likely cost more to lease. Minimally acceptable environmental standards cost less than potentially cleaner or safer technologies. Truck drivers could save time and money by transporting hazardous waste through, rather than avoiding, residential communities.

It makes no sense to insulate contractors from the fiscal ramifications of these discretionary decisions.

Now, this differs dramatically from the SAFETY Act, which assumes that without liability protection, contractors might not let the Government deploy qualified anti-terrorism technologies to combat terrorism. This bill involves common tasks: demolition, repair, debris removal, de-watering flooded property, where the existing standards of care are reasonable.

Moreover, Mr. King ignores the fact that the rather mechanical certification assigned to the Chief of Engineers is a far cry from the highly judgmental and discretionary SAFETY Act certification. Now, consistent with what Mr. King says, in a fraction of the Government's contracts that involve nuclear materials or highly volatile missile fuel, work is extraordinarily complex and dangerous. In extraordinary circumstances, we have unique rules that insulate and indemnify contractors from liability.

Do not confuse the extraordinary with the ordinary. For basic public services, extraordinary measures are not appropriate. This bill also continues a trend that exploits Katrina to pursue otherwise untenable public policies. Look, Congress hastily raised the micro-purchase threshold, in effect, the charge card purchase cap, to $250,000, even though the Government's management of the charge card program has been abysmal. Fortunately, the Administration stopped that. Subsequently, the same can be said for the suspension, and later repeal of the suspension, of the Davis-Bacon Act for totally disingenuous purposes.

Now, hopefully reason will prevail here. Knowledgeable procurement executives understand that the current procurement regime contains sufficient flexibility for the Government to meet its purchasing requirements in times of crisis, and I believe that's what

the Corps told you today and what their written testimony says. They are not having trouble getting contractors to do the work.

Finally, elsewhere Congress has called for more auditors and inspector generals to scrutinize Katrina-related contracting. Don't forget that an ounce of prevention is worth a pound of cure. The 1990's witnessed dramatic acquisition workforce cuts, and since 9/11, procurement spending has increased by more than 50 percent. More auditors and inspector generals will not help avoid the scandals or improve the performance of the procurement system. Conversely, an investment in the number and skills of purchasing officials would reap huge dividends.

Thank you again for this opportunity, and of course, I would be pleased to answer any questions.

Senator THUNE. Thank you, Professor Schooner.

Mr. Becker.

STATEMENT OF PAUL BECKER, PRESIDENT, WILLIS NORTH AMERICAN CONSTRUCTION PRACTICE

Mr. BECKER. Thank you, Senator Thune, good afternoon.

My name is Paul Becker. I work at Willis, a global insurance broker, as a North American Construction Practice group leader. I am proud to lead this practice, as my colleagues and I represent over 3,500 contractors in North America. We work to structure and secure effective risk management programs that can address safety issues, contractual liabilities and surety bonds.

I have been in the insurance business for 27 years, and the vast majority of this has been in the construction sector. It is my pleasure and honor to appear before you today to testify to the importance of insurance in the cleanup of New Orleans and the Gulf Coast in the wake of Hurricane Katrina; specifically, the need to limit the liability of the contractors engaged in this work.

As insurance brokers, we work with our clients around the world and across all industries, helping them assess, quantify, mitigate and transfer these risks, thereby allowing them to focus on achieving their business goals. Doing so affords them the comfort and the confidence that their assets, property, people, intellectual capital and equipment are more than adequately and properly protected against a broad range of risks.

We are not an insurance company. That is, we do not underwrite the risks. We are an intermediary, bringing the two parties together, working to fashion the very best customized coverage we can secure for our clients. As part of this client advocacy, we work and have developed strong relationships with insurance carriers around the world, such that we know their risk appetite, how they consider certain risks and the various factors that weigh in their underwriting decisions.

Given our experiences, we have a working knowledge as to how they think and how they approach various risks. Essentially, whether or not to underwrite a risk, how to price a policy and how to set the terms and conditions of a policy which amounts to a contract.

In the aftermath of the events of September 11, Willis secured the insurance coverages for the contractors who cleaned up the World Trade Center site. As was spoken earlier today, those insur-

ances were somewhat limited to workers compensation and a narrow scope of liability. Quite thankfully, and for obvious reasons, the characteristics of this site were unlike any we or anyone else in either the construction or insurance industry had ever seen. Normally, before the cleanup of a disaster site starts, environmental and engineering firms conduct studies, run assessments and issue reports as to the nature of the site and the specifics involved.

Due to the outstanding circumstances of the events of 9/11, there was not time for such exercises, and contractors got to work without a full understanding of what was ahead: how stable was the ground, what were the asbestos levels, what other hazardous materials could have a long-term impact on the health of the workers and the general public. Today, over 4 years since 9/11, the number of suits, as was heard earlier today, being filed continues to grow. Only in time will we determine the balance between the insurance purchase versus the claims now being filed in New York.

But one thing is certain. Litigation upon litigation upon litigation has created a great deal of uncertainty and serious concern among the contractors involved. While the scope of the New Orleans effort is multiples larger than the World Trade Center site, the same concerns are on hand today as were on hand on 9/11. The fundamental problem in securing the necessary coverage is a reflection of four component actions I mentioned a few moments ago. Insurance is about assessing, quantifying, mitigating and transferring risks. Models predict likely scenarios, calculate possible losses and then intelligent plans determine how to avoid such problems and spread the risk among various parties at appropriate price.

In these unique situations, there can be a tendency to focus on the financing of the risks so the work can get underway. Without the assessment, how does a carrier know what the possible losses are? If the risks are unknown, there can be significant unforeseen liabilities. One, how can contracting firms adopt preventive measures to avoid problems which can give rise to future claims? How can carriers determine the right price for the coverage?

Over the last several weeks, we have engaged in conversation with carriers around the world on this matter, and they are expressing to us the various concerns that I am sharing with you today. Uncertain site conditions, unusual and known health hazards, what chemicals are being released into the air during the cleanup, the limited nature of the tools available to assess the number and types of environmental factors in play, the varying standards between local, State and Federal authorities, the fast-track nature of the work to be done, and the lack of certainty on contracting provisions and legal environments.

All of these factors substantiate the traditional methods of risk identification, control and underwriting have been significantly altered and make it difficult to estimate or even guess what the full extent of the long-term liabilities arising from the cleanup will be. Make no mistake: these are long-term liabilities. It leads us to question whether the insurance industry has the ability to fully underwrite the risks inherent in the work.

If this bears out, contractors will be left fending for themselves without adequate insurance protection. This is not to say that contractors will not be able to procure insurance in some form for their

activities in the Gulf. Rather, without addressing the unique factors in this situation, the coverage they will be able to obtain will in most cases not adequately protect them over time from the exposures they will be facing.

This is not a question of if, but when, and based on our experience, these matters will manifest themselves over a 5- to 10-year timeframe. There is talk already of a Katrina cough. This is very similar to the World Trade Center.

I might add that without protection, contractors cannot properly account for their risks and endanger the long-term viability of their companies. Accordingly, these issues could prevent quality contractors from participating in the cleanaup and recovery efforts.

This is important legislation. Reasonable and responsible contractors tend not to get involved in projects of any magnitude unless they have insurance against what are normally quantifiable risks, and carriers as well tend not to write policies if they are not able to make the necessary judgments. In the case of New Orleans, as it was at the Trade Center, neither can establish the proper control procedures to protect their interests.

Limiting the liability of construction companies engaged in the cleanup such that they can gain the cover they need is critical. It has been my distinct honor to share my experiences with you this afternoon. Mr. Chairman, I conclude this section of my report and will submit the rest into the record.

Thank you.

Senator THUNE. Thank you, Mr. Becker.

Let me ask you a question. In your experience, how many Federal responses have exceeded $15 billion? Do you know the answer to that question?

Mr. BECKER. According to the Insurance Institute, there have been four distinctive disasters that have been assessed at more than $15 billion.

Senator THUNE. So it is very narrow, based on at least historical experience?

Mr. BECKER. With insurance catastrophic modeling, that is correct. Those are not all inflation adjusted, but those would be Hurricane Andrew, the World Trade Center, certainly Katrina and probably Northridge Earthquake.

Senator THUNE. What do you think is the risk if Congress does nothing to address the liability issue?

Mr. BECKER. As it stands right now, the insurance companies are telling us that they are having a very difficult time coming up with insurance products that will extend over the long term and appropriately cover the long-term risks. Most of what we saw at the Trade Center, as you can see, are continuing to evolve, long-term chronic injuries or health issues that are just now becoming apparent in a big way. We believe that that long-term nature of it is the most difficult part for the insurance companies to address.

So right now they are not responding to many of our contractors with the type of coverage that we believe is appropriate.

Senator THUNE. I have to say, I guess it is probably indicative of this entire discussion, but the profound difference of opinion between Mr. King and Mr. Schooner is if nothing else very inter-

esting to listen to. Let me ask a question for Mr. King, and this sort of ties back into your testimony.

Do you believe, from a legal perspective, that it is fair for private contractors, which act as an extension of the Federal Government during disaster situations, to be subject to tort claims when all applicable Federal rules and regulations are adhered to?

Mr. KING. Let me address it this way. Senator Boxer said something earlier that I agree with, which is, when you have a problem like this, what you want to do is sit down, look at the interests of all parties and say, what's the right thing to do. In this instance, the right thing is probably two stages. The first stage is to not penalize contractors for showing up to help. Professor Schooner says, listen, we ought to focus on who is the most appropriate to bear the liability as between a company and an individual. That's the wrong question.

As between everybody out there, the contractor should not be penalized for showing up. So the first step is to provide this limited liability so that the contractor is in the same shoes as the Government with regard to third party suits.

Having done that, we have done the first step of the right thing. The second step is to then sit back and say, who is it that should pay the money and how should it be paid for individuals who are affected adversely by Hurricane Katrina, previously the terrorist activities up at the World Trade Center, who should pay the price. It is not intuitively obvious that the contractor, just because they are the only ones on the scene who have any money, ought to pay the price.

So it is appropriate for Congress to answer that question. Now, clearly, if we look at the question of who is the superior risk bearer it's the Government. But the Government really has to decide what's the appropriate compensation mechanism. As your question implies, the answer is, it's not the contractors who showed up to help you through the problem.

Senator THUNE. Mr. Schooner.

Mr. SCHOONER. I actually think that until he closed, what Mr. King was offering was an attractive oversimplification, but in the end he hit the nail on the head. Faced with a situation like this, and this is not unprecedented in terms of experiences the Government has had, we have experience with the nuclear industry. We have experience dealing with volatile missile fuel where the potential for disaster exceeds anything that the insurance industry has ever been capable or willing to absorb.

So you get a simple calculus, as he pointed out. The Government can require the contractor to purchase insurance and reimburse those costs of insurance, which is what happens in Government contracts every single day. So we allocate the risks to the contractor and the Government reimburses the contractor for its costs.

When we reach the point where insurance becomes so expensive that the Government doesn't want to pay it or that the contractor truly cannot get insurance, historically the Government has indemnified the contractor and in effect become a self-insurer. The main point I am trying to make here is, Mr. King is right that if the Government is willing to assume the responsibility for injured individ-

uals, none of this is relevant, because the Government is a far superior risk-bearer.

It is irresponsible and ultimately unacceptable to say, as a matter of policy, that when a contractor injures someone, we have decided that the superior risk-bearer is an individual that cannot anticipate, cannot avoid, cannot insure against, and cannot bear the costs. It is not what a responsible Government would do.

Mr. KING. May I respond to that just briefly?

Senator THUNE. I'm sure you will.

[Laughter.]

Mr. KING. Professor Schooner posed two very interesting questions. One of them is, and just to put it in jargon in which he and I deal, it is the insurance liability clause of the Federal Acquisition Regulations, 52228–7, I believe it is, to throw the numbers out there. What it says is that in particular instances, the Government can require a certain amount of insurance and reimburse the contractor for that. Then any liability over and above that, the Government would reimburse the contractor.

What he forgot to tell you is that the Government as a policy decision has made it so that that cause is inapplicable to construction contractors and engineering contractors. What he has also forgotten to tell you is you only get paid if you go through the full litigation, come back, seek reimbursement, having gone through all this disruption, and then there is the question of whether you get your litigation costs paid. It is not an adequate response in this type of a situation.

The second one that he points out is what's called Public Law 85–804, incorporated by Part 50 of the FAR. In that instance, the Government does say if we have these extraordinary nuclear sorts of issues, then the Government may bear the risk. There is a process you go through to do that. It is quite burdensome, probably doesn't fit the Hurricane Katrina type situation.

What he doesn't tell you is that is limited to national security situations. There is nothing in the Stafford Act that allows that to happen.

So what you have is, in the case of anti-terrorism, you had a war on terrorism declared so the White House could then issue an executive order that brought that entire rubric under the national security interests of that sort of indemnification. That doesn't apply in these types of situations. Again, it is not as good or effective as the bill that we've got pending here that limits liability, doesn't make you go through all of those hoops for extraordinary contractual relief.

Mr. SCHOONER. First, Mr. King's points are perfectly valid, but what he's ultimately advocating is first, you could fix or modify a clause or you could expand or modify Public Law 85–804, both of which would be perfectly reasonable solutions.

But as a matter of policy, for the Government to stake out as statute that the least able risk-bearer should be the one to bear the loss is totally irresponsible. It is just unthinkable that our Government could do such a thing.

Senator THUNE. And least able risk-bearer being?

Mr. SCHOONER. Individual members of the public that can't anticipate the risk, can't insure against it, and can't bear the costs.

Senator THUNE. What would the Federal Government's legal exposure be if it carried disaster cleanups without private sector firms today?

Mr. KING. I think the contractors that preceded us indicated they simply couldn't do the job. I guess the General is the one who said, we couldn't do it without contractors. So you have a situation where I believe the General said, 99 percent of this work has to be done by contractors. The Government directs the work, the Government is immune. Somehow, because the contractors show up, they are supposed to be liable. That just doesn't make sense.

Senator THUNE. That immunity that applies in these types of situations, though, the Federal Government's "sovereign immunity," has that ever, in a situation like that, have we, the Federal Government, ever waived that? We did in New York to some degree.

Mr. SCHOONER. You mean like creating a fund.

Senator THUNE. Right, which we did in New York.

Mr. SCHOONER. We do that.

Senator THUNE. That was sort of an exceptional circumstance, although now it sounds like the claims are well in excess of what was allowed.

Mr. SCHOONER. There's a number of good models, where the Government has stepped into the fray and solved a failure of the marketplace. I think for example the vaccine fund is a perfectly reasonable situation. Bottom line is, vaccine manufacturers pay into a fund. People who are injured by the vaccines have, in effect, an automatic suit to the United States Court of Federal Claims, and the only real issue is damages.

So the point there is that you can either prospectively have contractors pay into a pool if you like that approach, or you could have the Government indemnify. The only point that I return to time and time again is: why would you assign or allocate the risk to the least able risk-bearer when there is a harm there?

I agree with everyone who has testified today. The goal here is not to make contractors responsible for injuries to the public by terrorists. The question is: when the contractor comes in to perform their work, why shouldn't they, when faced with a choice, exercise standards of care to the extent that the insurance industry would normally cover them? It just seems reasonable.

Senator THUNE. Mr. King.

Mr. KING. The issue very much is models. There are models to do all sorts of things. What Professor Schooner has tried to sidestep is the model of the Safety Act. He says it doesn't apply, we shouldn't consider it. There is no doubt on earth this statute is patterned after the Safety Act.

Now, let's talk about what the Safety Act is for just a moment. In the wake of 9/11, Congress enacted a statute that said exactly what this statute said, but applies it to anti-terrorism technologies. Congress invited companies to have their technologies certified by the Government as desirable for use against terrorism, then in the event of lawsuits, the Government contractor defense would apply.

Basically all the same types of protections that we are talking about here would be there. There would be a certification process, the whole sort of thing.

Now, what Professor Schooner says is, that is not like disaster recovery efforts for hurricane relief. That is absolutely wrong, because what he is focusing on is the technology, not the risk. If you focus on the risk, the risk of the extraordinary cleanup going on down in New Orleans is very much comparable to the risk of those anti-terrorism technologies.

When you focus on the risk, what you look at is the types of risk to the company, and I will tell you, if you go look at the applications for Safety Act certification, it is companies taking the normal work that they do and saying, we would like to have this sort of Government contractor defense apply for it, it is doing their normal work in an environment of extraordinary risk, which is exactly what our contractors told us is going on down in New Orleans. They are taking their normal work and they are going into an environment of extraordinary risk, and they are saying, it is not the typical situation, we need to have this sort of relief.

So this is exactly the same sort of thing that we did with regard to anti-terrorism technologies under the Safety Act. The decisions by the Government are the same types of decisions. The risks are comparable, and a Safety Act type model applies, not those other models that the professor was talking about.

Senator THUNE. I do have to go vote again. This is fascinating, and we could go on for a long time.

I will say, and I think that, I am aware of at least one example where, it was not while I was in the Congress, but when the anthrax incident hit, actually I think I was in the House at the time, I wasn't in the Senate, but it was in the Senate buildings, Dirksen and Hart Buildings, the contractor that came in to do the work on that, the Government did indemnify them.

Mr. KING. That was Public Law 85–804, under the Executive Order.

Senator THUNE. Right.

Mr. SCHOONER. So it works.

[Laughter.]

Senator THUNE. Well, that debate will rage on.

I thank you very much for your testimony and for your responses to the questions. I do want to include, without objection, I will include Chairman Inhofe's statement for the record, which we will insert.

Senator THUNE. Also, I have a couple of letters of support for this legislation. One from the American Road and Transportation Builders Association.

[The reference letter can be found on page 97.]

Then also the Transportation Construction Coalition, which is a coalition of not only engineering and construction but also some labor unions as well.

[The referenced material was not submitted at the time of print.]

Senator THUNE. With that, thank you so much for being here. We will leave the record open for a week. I suspect Senator Boxer will have some questions for you that she will submit in writing. Regrettably, she could not get here for the balance of this.

Thanks so much. The hearing is adjourned.

[Whereupon, at 5:47 p.m., the subcommittee was adjourned.]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator Thune, I would like to start off by thanking you for holding this important hearing. As Chairman of the Superfund and Waste Management Subcommittee, you have and continue to show great leadership and consideration over new and evolving issues.

The devastation from the recent hurricanes has been well covered in the media, but the rebuilding efforts—the positive aspects of the story have not been given the same level of attention. I hope that changes soon.

Today's hearing on your bill, the Gulf Coast Recovery Act focuses on another issue that has escaped the public eye—looming litigation and liability costs from trial lawyers against well-intentioned private contractors could have a significant chilling effect on disaster response and cleanup.

When the state, local or the Federal Government asks for help to rebuild our cities, the public expects the private sector to heed that call, and to work with the authorities. The public certainly does not anticipate that those well intending companies should be penalized simply for meeting their civic and patriotic duties.

We should promote policies that encourage good deeds, not restrict them. Senator Thune's bill does just that, and I am proud to be a co-sponsor.

I look forward to hearing from the witnesses, some of whom will explain the problems that they have encountered on the ground and the fear of unknown but likely litigation and liability costs makes them think twice before doing the right thing.

Penalizing Good Samaritans is bad public policy and bad moral policy. We cannot let that happen.

STATEMENT OF MAJOR GENERAL DON T. RILEY, DIRECTOR OF CIVIL WORKS, UNITED STATES ARMY CORPS OF ENGINEERS

INTRODUCTION

Mr. Chairman and members of the committee, I am Major General Don T. Riley and I am the Director of Civil Works for the U.S. Army Corps of Engineers. Thank you for the opportunity to testify before you today concerning the Corps' disaster-relief contracting procedures. Under the leadership of the Chief of Engineers, LTG Carl A. Strock, we practice a concept of openness. We strive to maintain transparency in our contracting activities and welcome oversight of our activities. From a contracting perspective, this visibility and transparency is best demonstrated by the publishing of our contract listing on our web site where we give specific contract information, to include the contractor, dollar value, and purpose of the contracts for all to see.

My statement is divided into four parts, pre-disaster planning, contracting during the "emergency" situation, "a return to normalc", and I will finish with comments on small and local business utilization.

PRE-DISASTER PLANNING

In our pre-disaster planning, the Corps has been assigned Emergency Support Function No. 3 (ESF 3) under the National Response Plan. This is one of fifteen assigned functions to various elements of the Federal Government. Under ESF 3, Public Works and Engineering, the Corps assumes the lead in the areas of water, ice, power, temporary roofing and debris removal. Having this responsibility, the Corps has created a program called the Advanced Contracting Initiative, or ACI. Under the ACI program, we competitively award contracts for future use in the areas of water, ice, power, temporary roofing, and debris removal. Having these contracts in place allows the Corps to rapidly respond to emergency situations. We did in fact use our ACI contracts to not only support the Katrina recovery, but those areas impacted by Hurricanes Rita, Wilma and Ophelia as well. We also used the contracts to support recovery efforts in the Southeast after several hurricanes of last year's hurricane season. The ACI program has been in place for about six years.

EMERGENCY

Using contractors to provide services that are not governmental in nature is typical of Government operations under normal circumstances. That is even more necessary in a disaster or emergency. Emergency situations typically require the application of significant resources beyond those that Federal organizations, the Corps included, need for use during normal operations. For example, it would be prohibitively expensive to maintain a full time, properly trained and equipped workforce

sufficiently large and sufficiently diverse to react to needs arising from any kind of disaster response scenario. Instead, we maintain sufficient resources to oversee a quick ramp-up of contractors, enabling us to tailor our response to the specific needs of the emergency. This avoids having resources that would be underutilized the majority of the year, but enables us to react quickly.

Turning to the emergency situation, the Federal Acquisition Regulation, (FAR), is based upon the principle of full and open competition. Drafters of the FAR, however, realized that emergency situations sometimes require emergency actions. As a general rule, the FAR mandates a 15-day advertisement period. The FAR also requires a 30 day proposal period in most cases. What does this mean? Simply stated, if we were to follow the rules for full and open competition, we would not have awarded a contract to get the flood waters out of the city of New Orleans until the end of October. Clearly the people of New Orleans could not wait. In fact, the FAR allowed us to considerably shorten the time period of the award, under the urgency exception to the Competition in Contracting Act. The Corps contracting officer contacted four companies on September 1, 2005. Of those four companies, only Shaw Environmental, Inc, of Baton Rouge, Louisiana, could respond in a timely manner to begin the un-watering effort. Contract award was made on September 2, 2005.

In our other efforts to support relief efforts in response to this emergency situation, the Corps considered and used the entire suite of available contracting options authorized under the FAR, including verbal and letter contracts. Using these methods, the Corps procured such critical items as sand bags to be used to stop the flow of water into New Orleans. You probably saw pictures of helicopters dropping these huge sand bags into the various levee breaches. It was an urgent situation, which required expedited procurement. Additionally, we made use of a Naval Facilities contract to assist in the un-watering of the city.

Due to the magnitude of Katrina and the wide-spread devastation, the Corps needed to award debris and roofing contracts in excess of those contracts pre-placed under the ACI program. Based on the large scale of the work that needed to be performed, we awarded four debris removal contracts following the emergency. Each contract is valued at $500 million with a $500 million option. This requirement was open to any company, under a shortened advertisement and proposal period. The Corps received 22 proposals in response to the advertisement. The contracting officer awarded the contracts on a best value to the Government basis. The Army Audit Agency is reviewing the award and administration of these four contracts.

Oversight of Corps contracts, especially in an emergency situation, is important to the Corps. Within just a few days of the storm hitting the Gulf coast, our internal review staff teamed with the Defense Contract Audit Agency and the Army's Criminal Investigation Division and deployed to the area of operations. Their mission, which is still ongoing, is to provide oversight of the operation, to include looking for instances of fraud, waste and abuse. This includes reviewing contracts.

RETURN TO NORMALCY

In our efforts to assist in the recovery of areas affected by Hurricane Katrina, we concluded that it is not yet prudent to follow the full waiting periods that apply in normal circumstances, before awarding contracts. It is our goal, however, to return to standard procurement operations as soon as possible. The Corps is currently moving in that direction. We are currently advertising our requirements for longer periods than we did under the urgent situation, we are attempting to give prospective contractors as much time as possible to prepare their proposals, and we are using Federal Acquisition Regulations principles and competitive awards to the maximum extent possible.

UTILIZATION OF SMALL AND LOCAL BUSINESSES

The Corps has made extensive use of standard authorities granted to us under the various small business set aside programs, especially in the area of 8(a) firms. Section 8(a) is a Small Business Administration business development authority to benefit minority owned, socially and economically disadvantaged firms. The program helps aspiring entrepreneurs build their businesses by helping them obtain Government contracts. Participants can receive non-competitive awards up to $3 million during a 9-year developmental program. Many of these small companies are local and therefore are already in the area and available quickly to participate in recovery efforts. We have also held, and will continue to do so, 8(a) competitions in which only Small Business Administration registered 8(a) firms from designated areas can compete. In those areas where we have awarded contracts to large businesses, our debris contracts mainly, we encourage use of local business subcontractors. We have instituted high goals for small business subcontracting and a reporting requirement

that keeps them focused on achieving results in these areas. These contractors report their sub-contracting efforts to us weekly for the first 90 days, and monthly thereafter instead of every six months, the typical reporting requirement. We have also inserted clauses citing the preference for use of local subcontractors.

We are in the process of developing our acquisition strategy for a newly assigned mission from FEMA, demolition, where the Corps will raze structures determined to be uninhabitable. We will include opportunities at the prime level for local disadvantaged companies and a geographic set aside for the unrestricted portion of the strategy. We are considering limiting competition to Mississippi companies for the Mississippi aspect of the mission and to Louisiana companies for the Louisiana aspect of the mission. Our estimates at this time are that the costs in Mississippi will be $500 million and $600 million in Louisiana. Award is planned for late December.

SUMMARY

To close, I would like to thank you once again, Mr. Chairman, for allowing the Corps of Engineers the opportunity to appear before this committee to discuss contracting procedures during times of emergencies. I would be happy to answer any questions Members of the committee may have.

Thank you.

RESPONSES BY MAJOR GENERAL RILEY TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. Major General Riley, you indicate in your testimony that the Army Corps relied on the Advance Contracting Initiative. Did the Initiative allow you to rapidly respond to emergency situations after Hurricanes Katrina and Rita?

Response. Yes, the Advance Contracting Initiative allowed us to rapidly respond to emergency situations after Hurricanes Katrina and Rita. We were fortunate to have contracts already in place for debris, ice, power, and water, which we used extensively in responding to the hurricanes.

Question 2. Major General Riley, what is the number and value of contracts that the Army Corps has entered into that address the cleanup and rebuilding process following Hurricanes Katrina and Rita?

Responses. We have awarded a total of 106 contracts (87 for Hurricane Katrina and 19 for Hurricane Rita) to date for the two storms. In addition, we have awarded 248 task orders (216 for Hurricane Katrina and 32 for Hurricane Rita) to date for the storms not including modifications to task orders. A total of approximately $2 billion has been obligated as of 13 December 2005.

Question 3. Major General Riley, you indicate in your testimony that the Army Corps awarded four $500 million Katrina-related debris removal contracts, and that each had an additional $500 million option. You also indicated that the Army Corps got two dozen proposals for the work. Are you dissatisfied with the quantity of the contractors you selected for these contracts?

Response. No, we are not dissatisfied with the quantity of the contractors selected for these contracts. In fact, we are very pleased with the 22 proposals we received for this emergency acquisition. Given the magnitude of the work and the geographic scope covered by the work, we felt that four contractors were adequate to respond to the debris removal action.

RESPONSES BY MAJOR GENERAL RILEY TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Major General Riley, on November 3, 2005, the Washington Post published an article, entitled "Levee Construction Faulted in New Orleans Flood Inquiry." The article discussed an inquiry of New Orleans levee construction by independent investigators and how faulty construction practices by contractors may have played a role in failure of the levees. I have three questions regarding the contracting practices of the U.S. Army Corps of Engineers. First, how does the Corps screen potential contractors that it employs?

Response. The Corps generally uses sealed bidding or competitive negotiations. In sealed bidding competitions, the contracts are awarded to the contractor that submits the bid containing the lowest price. Competitive acquisitions represent the best value for the Government and are awarded based on an examination of the offeror's past performance, technical capabilities, management plan and price as presented in the bid package.

Question 2. Second, does your screening include a review of complaints and lawsuits filed by private parties against contractors?

Response. The General Services Administration maintains a Government-wide listing of all firms that have been debarred or suspended from contracting with the Federal Government. The Contracting Officer's Representative screens this listing prior to making a final contract award decision.

Question 3. Third, regarding S. 1761, if contractors are shielded from liability by private parties, how will this impact the Corps in awarding contracts for relief efforts related to Hurricane Katrina and future natural disasters?

Response. We do not know what impact this proposed legislation would potentially have on competition

---

STATEMENT OF ANTHONY ZELENKA, PRESIDENT, BERTUCCI CONTRACTING CORPORATION

Thank you Chairman Thune, Ranking Member Boxer and the distinguished members of the Subcommittee for this opportunity to testify on Louisiana's struggle to recover from Hurricane Katrina, and the great need for legislation along the lines of the Gulf Coast Recovery Act of 2005 (S. 1761), which I support and urge Congress to enact.

I am Tony Zelenka, the President of Bertucci Contracting Corporation. My company is a small business that performs levee and coastal restoration work across the Gulf Coast. I was born and raised in New Orleans, and I have over 20 years of experience in the construction industry. My family's firm traces its history back to 1875, when my great-great grandfather founded the company in New Orleans.

The morning after Hurricane Katrina hit the Gulf Coast, I waded through chest-deep water to reach the closest highway. As I did, I carried my bicycle over my head, so I could ride to my truck and then drive to my family, who had evacuated to Jackson, Mississippi. I had stayed behind to make sure our home and business survived the storm.

While with my family, I learned that the levees in New Orleans had failed. I knew that the Army Corps of Engineers was going to need contractors to stop the flooding, so I headed for the Corps' emergency response center in Vicksburg, MS. After meeting with Corps officials that first day, and with no more than an oral agreement to execute a written contract, I went to work hauling stone and rock to repair the breached levees that had flooded New Orleans. I was one of the first contractors to arrive on the scene.

In a situation like this, contractors like me focus on protecting our employees and helping our communities as quickly as possible. Under the direction of the appropriate authorities, we help our country recover from one disaster after another. We are the first entities, the first responders, to arrive on the scene of a disaster with the goal of providing whatever support we can. In the case of Hurricane Katrina, we did everything we could to stop the water from pouring into New Orleans. For the past 10 weeks, we have been working seven days a week.

Personally, this disaster has touched many contractors in the area. While my home, thankfully, was spared from the devastation, many of my employees and their families' lives have been ruined by this disaster. As we continue our efforts to clean-up the city, I have also sought to help my employees re-establish their lives and livelihoods.

The cleanup process in New Orleans continues to move forward. Standing side-by-side with my employees, I have personally done a lot of the work, and I have done it under crisis conditions. From the beginning, we have worn personal protective equipment, and done our best to protect ourselves from the many hazards, but like it or not, we have had to wade through the flood waters, and deal with the spray that the helicopters caused. We continue to deal with gas leaks, oil spills, downed electrical lines, and backed up and overflowing sewer lines.

While you all have been watching the devastation on television, we have been living it. Many of my employees are still homeless and have had their families displaced, and my city is uninhabitable. In fact, I am a little nervous about being away from the job site in the daylight for the first time since this terrible tragedy first happened.

Construction contractors have a critical role in providing disaster assistance to Federal, State and local officials. We are essential in the rescue of both persons and property. Our country has never experienced a dislocation of the size and scope of Hurricane Katrina. Contractors like me stopped the flow of water into the city and we will be busy for months on the demolition, removal, repair and reconstruction of both structures and utilities damaged by the hurricane. We will cleanup property

polluted by the hurricane, remove vast amounts of debris, and dewater flooded areas. This is our city and we want to bring it back.

Unfortunately, there are people out there who want to capitalize on this tragedy and others like it. Lawsuits have been filed against contractors who have performed the types of rescue and recovery work my firm has been doing in New Orleans. Take a look at what happened in New York after the terrorist attacks on 9/11. Hundreds of lawsuits were filed against contractors for the heroic work they did to cleanup Ground Zero in a short amount of time at the express direction of the Federal, State and local authorities. I have attached an AP story to this testimony that reports on the litigation.

The madness has already started in Louisiana, where a contractor was named as a defendant in a class-action only three weeks after the Hurricane hit. The trial lawyers sued the contractor for building a faulty levee which the contractor did not build in the first place. The case was dismissed after a few days, but it is a prime example of the hunger out there no matter how arbitrary the suit may be - to sue contractors.

I worry that I may be sued for property damage as part of the clean-up. Recently, I have been hired to begin work on the massive debris removal contract in New Orleans, which may include the demolition of private homes damaged by the hurricane. This is a very emotional situation even though all levels of Government have determined that many of these homes are completely uninhabitable and beyond repair or restoration. The Government has decided that they must be torn down and completely rebuilt, due to the flooding, hurricane winds and mold. But I now fear legal risk for moving ahead, and doing exactly and only what the Government hired me to do. Why am I worried? Because everyone has spent all this time looking for someone to blame, instead of looking for a solution. Meanwhile, contractors are expected to continue the cleanup, and do it as safely and quickly as possible, despite an uncertain legal and logistical environment.

Remember, unlike many public officials and their agencies, contractors have no sovereign immunity. We look to the Government at all levels for guidance on the best way to do this work safely and efficiently. Ultimately, in emergency situations we have to put our assets on the line if we want to help, which means I may be at risk of losing my company for simply doing what I have been hired by the Federal Government to do trying to help save my city.

I believe passing The Gulf Coast Recovery Act (S. 1761) is necessary to ensure that contractors like me will be there to do the work in the future, without fear of reprisal. The bill offers limited protection to Government contractors from any citizen suits that might result from their performance of disaster recovery contracts, enabling them to focus on the work. This legislation would give my firm a reasonable measure of protection, allowing me to pass this fifth-generation family business on to the sixth generation.

Do not let the trial lawyers penalize the contractors like me who report for duty. We are a critical link in the restoration of our city. I ask you to pass this legislation. I also ask you to do something else listen to the experts. Listen to the Army Corps of Engineers. Listen to the local levee districts. Do not shortchange the rebuilding and flood protection efforts underway.

I have been asking for increased funding for the Southeast Louisiana Urban Flood Control Project (SELA) for years, but unfortunately, my calls for increased funding to rebuild the wetlands and coastline and provide additional protection for New Orleans have consistently fallen on deaf ears. Please tell your colleagues to not only increase investment, but fully fund this national priority.

Please approve the Gulf Coast Recovery Act and please commit to rebuilding my city.

Thank you for this opportunity to comment. I look forward to working with the Subcommittee and would be happy to answer any questions.

RESPONSE BY ANTHONY ZELENKA TO AN ADDITIONAL QUESTION FROM SENATOR BOXER

Question 1. Mr. Zelenka, do you believe that negligent contractors should be shielded from liability to private parties in cases of a declared disaster of the scope described in S. 1761?

Response. I do not believe that contractors should be shielded from liability to private parties in cases of a declared disaster of the scope described in S. 1761 to the extent that the damage is caused by the contractors negligence.

RESPONSE BY ANTHONY ZELENKA TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. Mr. Zelenka, in your testimony, you referenced lawsuits filed against contractors performing rescue and recovery work in New Orleans. Are any of these suits for damages related to environmental pollution or adverse health effects from pollution?

Response. I do not know of any lawsuits for damages related to environmental pollution or adverse health effects from pollution.

STATEMENT OF BEVERLY WRIGHT, PH.D, DIRECTOR, DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE AND CO-CHAIR, NATIONAL BLACK ENVIRONMENTAL JUSTICE NETWORK

INTRODUCTION

Good morning Mr. Chairman. I am Dr. Beverly Wright, Director of the Deep South Center for Environmental Justice at Dillard University, formerly at Xavier University. Regrettably, both of these Historically Black Colleges are underwater now and temporarily closed due to Hurricane Katrina. I am also here today representing the National Black Environmental Justice Network (NBEJN).

Thank you for the opportunity to testify before the Subcommittee on critical issues of concern in the aftermath of the hurricanes. My professional and personal experiences of growing up, living and working in the City of New Orleans greatly influence my perspective and testimony.

WHO WE ARE

The Deep South Center for Environmental Justice (DSCEJ), at Dillard University in New Orleans, formerly at Xavier University of Louisiana, is now temporarily relocated in Baton Rouge, Louisiana.

The Deep South Center was launched in 1992 in collaboration with community environmental groups and other universities within the southern region to address environmental justice issues. DSCEJ provides opportunities for communities, scientific researchers, and decision makers to collaborate on programs and projects that promote the rights of all people to be free from environmental harm as it impacts health, jobs, housing, education, and general quality of life. A major goal of the Center is development of minority leadership in the areas of environmental, social, and economic justice along the Mississippi River Chemical Corridor. The Deep South Center for Environmental Justice is a powerful resource for environmental justice education and training.

DSCEJ has developed and embraces a model for community partnership that is called "communiversity." The essence of this approach is an acknowledgement that for effective research and policy-making, valuable community life experiences regarding environmental impacts must be integrated with the theoretical knowledge of academic educators and researchers. The Deep South Center for Environmental Justice has three components in terms of reaching our objectives: (1) research and policy studies, (2) community outreach assistance and education; and (3) primary, secondary, and university education.

The National Black Environmental Justice Network was founded in New Orleans, LA in December 1999. NBEJN members founded the organization in New Orleans because we felt then, as now, that Louisiana and the Chemical Corridor between the City and Baton Rouge are under siege from and epitomize environmental and economic assaults. These assaults are costing Black people their very lives. NBEJN believes in the sacred value of every human life regardless of race, ethnicity, religion or socioeconomic status. We see in the tragedy of Hurricane Katrina, Hurricane Rita and the aftermath a unique opportunity to shape the conversation and dialogue about rebuilding of New Orleans and the Gulf Coast region with the goals of environmental and economic justice for everyone.

TARGET AREA AND POPULATION SERVED

DSCEJ is national in scope with emphasis on the Mississippi River Chemical Corridor and Gulf Coast Region and global emphasis on communities impacted by the petrochemical industry. The major populations served include people of color with special concentration on African Americans and the African Diaspora, students and faculty at Historically Black Colleges And Universities/Minority Serving Institutions (HBCU/MSI) and public school teachers in urban areas. DSCEJ has forged collabo-

rations with other major research institutions and Governmental agencies that can assist in the development and implementation of the center's work.

CENTER OBJECTIVES

DSCEJ principal objectives include: (1) development of minority leadership in the field of environmental justice; (2) development of culturally sensitive training models for minority residents in at-risk communities; (3) development and distribution of culturally sensitive environmental justice education materials and training modules; (4) increasing environmental justice literacy among college students at HBCU/MSI's; (5) development of a pipeline creating a new generation of environmental justice leaders at HBCU/MSI's; (6) development and implementation of a K-12 teacher training program in environmental justice; (7) conducting research to determine the impact and extent of toxic exposure for minority communities as it affects health and the environment; (8) investigating means of addressing these problems (i.e., brownfields redevelopment, toxics use reduction, climate change, clean production and green chemistry, and economic development; and (9) creating linkages between impacted communities, scientific researchers, and Government officials to address environmental justice issues as they impact health, jobs, housing, and overall quality of life.

THE KATRINA AFTERMATH

As the floodwaters recede in New Orleans and the Gulf Coast region, it is clear that the lethargic and inept emergency response immediately following this devastating storm was the real disaster that nearly overshadowed the actual storm. We were all left nearly paralyzed in front of our television sets completely unable to continue with our daily lives watching the unbelievable events unfold right before our eyes. Americans were shocked beyond belief that this could happen in America, to Americans. It also raised lingering questions and doubts about our overall security. Is Government equipped to plan for, militate against, respond to, and recover from natural and manmade disasters? Can the public trust Government's response to be fair? Does race matter?

Examination of historical data reveals that emergency response reflects the preexisting socioeconomic and political structures of a disaster area and is based on race and class differentials. Generally communities of color receive less priority in response time than do their white counterparts where emergency response is required. We can assume that this differential response will occur in all areas relative to the resolution of the aftermath of Hurricane Katrina.

ENVIRONMENTAL DAMAGE

New Orleans and outlying areas suffered severe environmental damage during Katrina, the extent to which has yet to be determined. The post-Katrina New Orleans has been described as a "cesspool" of toxic chemicals, human waste, decomposing flesh and surprises that remain to be uncovered in the sediments. Massive amounts of toxic chemicals were used and stored along the Gulf Coast before the storm. Literally thousands of sites in the storms path used or stored hazardous chemicals, from the local dry cleaner and auto repair shops to Superfund sites and oil refineries in Chalmette and Meraux, La, where there are enormous stores of ultra-hazardous hydrofluoric acid. In the aftermath of the storm some sites were damaged and leaked. Residents across the Gulf Coast and the media reported, "oil spills, obvious leaks from plants, storage tankards turned on end and massive fumes."

Short-term rebuilding objectives must not outweigh long-term public health protection for all Americans and the environment they depend upon. Some of the legislative proposals now under consideration in the aftermath of Katrina do not adhere to this principle. Congress must act now to protect our most vulnerable populations and preserve our most unique and irreplaceable resources. It is imperative that Congress responds quickly and effectively to the devastating aftermath of Hurricanes Katrina and Rita. It is also important, to temper our haste to rebuild with a strong commitment to public health and the environment. Moreover, the public has a right to clean air and water and it must be protected. No law should ever move forward that would in any way sacrifice these principles.

Have we learned anything over the last 40 years, since Hurricane Betsy struck, that should guide our decisions after Hurricanes Katrina and Rita? Much of the proposed legislation concerning rebuilding the Gulf Coast region strongly suggests that we have not. In fact, it seems that some are using the crisis of Hurricane Katrina to advance their political and policy agenda, including weakening, waiving and roll-

ing back public health, environmental justice and environmental laws and regulations.

It is ironic that the tragedy of Hurricane Katrina is being used to justify sweeping waivers of public health, safety and environmental laws. The Gulf Coast Recovery Act (S. 1761) would leave many citizens without a remedy against contractors that cause irreparable harm to the air and water. The bill gives unprecedented legal protection to contractors being paid for work related to Katrina in areas of rescue, recovery, repair and reconstruction. The bill is far reaching in that these protections do not only apply to Katrina contractors; under the bill, they will also apply to contractors in all future disasters that result in at least $15 billion dollars of Federal assistance.

The Gulf Coast Recovery Act, while designed to help victims of Katrina, could very well end up helping everyone but the victims in the long run. S. 1761 is particularly egregious to low income and minority communities in the Gulf Coast Region. All of the limitations apply only to actions brought by private citizens. The section 4 limitation on filing a lawsuit is specifically limited to "private parties" and section 5(e) specifically provides that nothing in that section limits an action that any Governmental entity may bring. I thought that the Government's role was to protect the citizenry. This bill (S. 1761) seems designed to do just the opposite.

By eliminating the threat of liability for contractors you in effect remove an essential protection for the public. Where there are no consequences there are high risk and general disregard for the public's safety.

This bill seems to not be so well thought out. The actions taken by this bill in my opinion, aptly depicts the moral of the old adage of "throwing out the baby with the bathwater." We should remember that, in this case, it is not the contractors who are the victims. Powerful corporations with huge Government contracts will make millions in profit from the Katrina tragedy. The payments will be made with our tax dollars. This bill S. 1761 should be rejected by the Senate. In essence it will ultimately defeat the overall purpose of cleaning up the Gulf Coast and setting the road for its recovery. If contractors no longer fear legitimate legal liability, where is the incentive to do good work? And, when the dust settles with possibly untold numbers of properties improperly cleaned up, debris inadequately disposed of with personal injury due to contractor's negligence, who will then pay the bill?

The victims of Katrina have suffered immensely from first an inadequate response that caused the lives of many citizens, the loss of property, family members and their communities. Now, the Government will hold harmless contractors who may further injure the citizenry through neglect and irresponsibility.

These citizens of the United States and victims of the worst natural disaster ever in North America have been placed in double Jeopardy by this event. And in each instance the Government has played a major role. First, with the slow and inadequate response to Katrina and now with a quick response that fails to adequately protect citizens in the aftermath of the storm.

I would like to put into context exactly what has happened here, and who it has happened to, in an attempt to explain why S. 1761 is so objectionable.

BEFORE HURRICANE KATRINA PREEXISTING VULNERABILITIES

Katrina struck a region that is disproportionately African American and poor. For example, African Americans make up twelve percent of the United States population. New Orleans is nearly 68 percent black. The African American population in the Coastal Mississippi counties where Katrina struck ranged from 25 percent to 87 percent black. Some 28 percent of New Orleans residents live below the poverty level and more than 80 percent of those are black. Fifty percent of all New Orleans children live in poverty. The poverty rate was 17.7 percent in Gulfport, Ms. and 21.2 percent in Mobile, AL. in 2000. Nationally, 11.3 percent of Americans and 22.1 percent of African Americans live below the poverty line in 2000.

New Orleans is prototypical of environmental justice issues in the Gulf Coast region. Before Katrina, the City of New Orleans was struggling with a wide range of environmental justice issues and concerns. Its location along the Mississippi River Chemical Corridor increased its vulnerability to environmental threats. The City had an extremely high childhood environmental lead poisoning problem. There were ongoing air quality impacts and resulting high asthma and respiratory disease rates and frequent visits to emergency rooms for treatment by both children and adults. Environmental health problems and issues related to environmental exposure was a grave issue of concern for New Orleans residents.

The African American community in New Orleans was already grappling with the nationally identified health disparities for minorities reported by the National Institutes of Health (NIH). These conditions were exacerbated by environmental condi-

tions triggering asthma and exposing children to lead. High blood pressure, diabetes and cancer were also prevalent in the African American community.

DISPLACEMENT POST KATRINA

Residents in the Gulf Coast region fled the hurricane zone. More than a million Louisiana residents fled Hurricane Katrina. An estimated 100,000 to 300,000 Louisiana residents alone could end up permanently displaced. Nearly 100,000 Katrina evacuees are in 1,042 shelters scattered in 26 States and the District of Columbia. Katrina has left environmental contamination in Gulf Coast neighborhoods that will have to be cleaned up before residents can move back. An estimated 150,000 houses may be lost as a result of standing in water from Katrina. We are still grappling with understanding the full impacts of both Hurricanes Katrina and Rita.

Thousands of hurricane survivors along the Gulf Coast must now cope with the loss of relatives and friends, homes, and businesses and, what we term, loss of community. Katrina displaced just under 350,000 school children in the Gulf Coast. An estimated 187,000 school children have been displaced in Louisiana, 160,000 in Mississippi and 3,118 in Alabama. Katrina closed the entire New Orleans school system indefinitely. One hundred and twenty-five thousand New Orleans children alone are attending schools elsewhere. Over 93 percent of New Orleans schools students are African American. Evacuees' children are being enrolled in schools from Arizona to Pennsylvania, including almost 19,000 who will be attending schools in Texas.

For the survivors who lost everything, it involves coping with the stress of starting all over. Two weeks after Katrina struck, more than 2,500 children were still separated from their families. One can only imagine the mental anguish these families are going through. On the heels of this disaster, Hurricane Rita struck the coastal areas again.

There is much speculation about what the new New Orleans will look like: whether the Mississippi Gulf Coast should now consider land-based Casinos versus riverboats; the social economic and political structure of "New" New Orleans; rebuilding a green and sustainable Gulf Coast region that embraces innovative green building technologies and principles; construction of a levee system that will protect New Orleans; and development of environmentally and economically sustainable communities must all be explored simultaneously. None of these concepts are relevant unless the cleanup in the region is properly conducted and completed. This conclusion is not based on speculation. The community of Agriculture Street Landfill in the City of New Orleans has lived the nightmare of discovering that their homes were built on top of a landfill that was reopened to dispose of the tons of debris resulting from Hurricane Betsy.

HURRICANE BETSY—NEW ORLEANS, LA

Hurricane Betsy struck the State of Louisiana and the City of New Orleans in 1965. Betsy was then the "most destructive hurricane on record to strike the Louisiana coast."[1] The damage and flooding throughout the State covered 4,800 square miles, killed 81 persons, caused the evacuation of 250,000 persons, and disrupted transportation, communication, and utilities services throughout the eastern coastal area of Louisiana for weeks. Betsy hit the mostly Black and poor New Orleans Lower Ninth Ward especially hard. This is the same neighborhood that was inundated by floodwaters from Katrina and then suffered the indignity of a second flooding by Rita. Over 98 percent of the Lower Ninth Ward residents are Black and a third live below the poverty level.

Many Black New Orleans residents still believe that white officials intentionally broke the levee and flooded the Lower Ninth Ward to save mostly white neighborhoods and white business districts. In 1965, a disproportionately large share of Lower Ninth Ward residents did not receive adequate post-disaster financial assistance in the form of loans and other support to revitalize the area. Betsy accelerated the decline of the neighborhood and out-migration of many of its longtime residents. Debris from Betsy was buried in the Agricultural Street Landfill located in a predominately Black New Orleans neighborhood. Over 390 homes were built on the northern portion of the site from 1976-1986. The Agricultural Street Landfill neighborhood was added to the National Priorities List as a Superfund site in 1994.[2]

---

[1]Craig E. Colten and John Welch. "Hurricane Betsy and Its Effects on the Architecture Integrity of the Bywater Neighborhood: Summary." May 2003.

[2]See Agency for Toxic Substances and Disease Registry, Public Health Assessment-Agriculture Street Landfill, New Orleans, Orleans Parish, Louisiana, Atlanta, GA: ATSDR (June, 1999); Alicia Lyttle, Agriculture Street Landfill Environmental Justice Case Study, University of Michigan School of Natural Resources, Ann Arbor, MI (January 2003)

NEW ORLEANS AGRICULTURE STREET LANDFILL COMMUNITY

Dozens of toxic time bombs along Louisiana's Mississippi River petrochemical corridor, the 85-mile stretch from Baton Rouge to New Orleans, make the region a major environmental justice battleground. The corridor is commonly referred to as Cancer Alley. Black communities all along the corridor have been fighting against environmental racism and demanding relocation to areas away from polluting facilities.[3]

Two largely Black New Orleans subdivisions, Gordon Plaza and Press Park, have special significance in terms of environmental justice and emergency response. Both subdivisions are built on a portion of land that was used as a municipal landfill for more than 50 years. The Agriculture Street Landfill, covering approximately 190 acres, was used as a city dump as early as 1910. Municipal records indicate that after 1950, the landfill was mostly used to discard large solid objects, including trees and lumber, and it was a major source for dumping debris from the very destructive 1965 Hurricane Betsy. It is important to note that the landfill was classified as a solid waste site and not a hazardous waste site.

In 1969, the Federal Government created a home ownership program to encourage lower income families to purchase their first home. Press Park was the first subsidized housing project of this program in New Orleans. The Federal program allowed tenants to apply 30 percent of their monthly rental payments toward the purchase of a family home. In 1987, seventeen years later, the first sale was completed. In 1977, construction began on a second subdivision, Gordon Plaza. This development was planned, controlled, and constructed by the U.S. Department of Housing and Urban Development (HUD) and the Housing Authority of New Orleans (HANO). Gordon Plaza consists of approximately 67 single-family homes.

In 1983, a portion of the Agriculture Street Landfill site was purchased by the Orleans Parish School Board as a site for a school. The fact that this site had previously been used as a municipal dump prompted concerns about the suitability of the site for a school. The school board contracted engineering firms to survey the site and assess it for contamination and hazardous materials. Heavy metals and organics were detected.

Despite the warnings, Moton Elementary School, an $8 million state-of-the-art public school opened with 421 students in 1989. In May 1986, EPA performed a site inspection (SI) in the Agriculture Street Landfill community. Although lead, zinc, mercury, cadmium, and arsenic were found at the site, based on the Hazard Ranking System (HRS) model used at that time, the score of three was not high enough to place them on the National Priority List (NPL).

On December 14, 1990, EPA published a revised HRS model in response to the Superfund Amendments and Reauthorization Act (SARA) of 1986. At the request of community leaders, in September 1993, an Expanded Site Inspection (ESI) was conducted. On December 16, 1994, the Agriculture Street Landfill community was placed on the NPL with a new score of 50.

The Agriculture Street Landfill community was home to approximately 900 African American residents. The average family income is $25,000 and the educational level is high school graduate and above. The community pushed for a buy-out of their property and to be relocated. However, this was not the resolution of choice by EPA. A cleanup was ordered at a cost of $20 million, the community buy-out would have cost only $14 million. The actual cleanup began in 1998 and was completed in 2001.[4]

The Concerned Citizens of Agriculture Street Landfill filed a class action suit against the City of New Orleans for damages and relocation costs. It took 9 years to bring this case to court.[5] The case was still pending before Katrina struck. It is ironic that the environmental damage wrought by Katrina may force the cleanup and relocation of the Agriculture Street Landfill community. But nothing can give them back their health and well being, or replace the family members and friends who might still be with them were it not for the health effects of living on a landfill.

---

[3]Robert D. Bullard, The Quest For Environmental Justice: Human Rights and the Politics of Pollution (San Francisco: Sierra Club Books, 2005).

[4]Alcia Lyttle, "Agricultural Street Landfill Environmnetal Justice Case Study," University of Michigan School of Natural Resource and Environment found at http//www.umich.edu.~snre492/Jones/agstreet.htm. (Accessed on October 6, 2004).

[5]Robert D. Bullard, The Quest For Environmental Justice: Human Rights and the Politics of Pollution.

THE MOST VULNERABLE

The majority of households and businesses in the 12 Hurricane Katrina affected counties in Alabama, Mississippi, and Louisiana do not have flood coverage. FEMA estimates that 12.7 percent of the households in Alabama, 15 percent in Mississippi, and 46 percent in Louisiana have flood insurance. Similarly, on 8 percent of the businesses in hurricane-affected counties in Alabama, 15 percent in Mississippi, and 30 percent in Louisiana have flood coverage.

Generally, people of color have higher levels of physical damage than whites largely due to segregated housing in older, poorly built homes. Black households are less likely to have insurance to cover storm losses and temporary living expenses. Because of racism and racial redlining, blacks are more likely than whites to receive insufficient insurance settlement amounts. Blacks are less likely than whites to have insurance with major companies as a result of decades of insurance redlining.

Because of the legacy of "Jim Crow" segregation, many African American consumers in the Louisiana, Mississippi, and Alabama Gulf Coast region may be concentrated in the secondary insurance market—smaller and less well-known insurance firms. This could prove problematic for Katrina victims. Nearly a dozen small insurance companies collapsed after Hurricane Andrew, which cost the industry about $23 billion in today's dollars. Andrew was the most expensive single hurricane until Katrina. The same thing could happen after Katrina. Many, if not most, Katrina low and moderate-income victims may not have resources to hire lawyers to fight the insurance companies.

CLEAN-UP STANDARDS AND PROTECTION OF PUBLIC HEALTH

Hurricane Katrina has left environmental contamination in Gulf Coast communities that will have to be cleaned up. In the New Orleans area alone an estimated 22 million tons of debris must be cleaned up and 145,000 cars ruined by hurricane floodwater will have to be disposed of. How, when, and at what level (methods of clean-up and clean-up standards) contaminated neighborhoods get cleaned up is a major environmental justice concern for African American communities.

Where the hurricane debris and waste end up is another issue that causes concern because of pre-existing power arrangements and the historical legacy of unequal protection and differential treatment provided to communities of color. It is important that Government officials not repeat the mistakes made in 1965 with debris from Hurricane Betsy disposed in an African American area—later to become the Agricultural Street Landfill Superfund site community. Black communities in the South, as documented in Dumping in Dixie: Race, Class, and Environmental Quality, are dotted with landfills, toxic waste dumps, and hazardous waste disposal sites.

Katrina toppled offshore oil platforms and refineries sending shock waves throughout the economy with the most noticeable effects felt at the gas pump. Katrina and Rita temporarily closed all oil operations and most natural gas operations in the Gulf region that supplies 29 percent of U.S.-produced oil and 19 percent of U.S.-sourced natural gas.

Katrina caused an unprecedented environmental and health crisis. The powerful storm caused 11 oil spills releasing 7.4 million gallons of oil. It also hit 60 underground storage tanks, five Superfund sites, and numerous hazardous waste facilities. More than 1,000 drinking-water systems were disabled and lead and ecoli in the floodwaters have far exceeded the EPA's safety levels.

Tests from the U.S. EPA and independent sampling conducted by the Louisiana Environmental Action Network (LEAN) in several New Orleans areas exceed Federal standards for residential communities. LEAN sampling found high levels of polynuclear aromatic hydrocarbons (PAHs) exceeding residential standards. Many PAHs are known or suspected of causing cancer. The testers found 12 PAHs in sediments the Lower 9th Ward. One, benzo (a) pyrene, was at 195 parts per billion, three times greater than the EPA residential standard of 62 parts per billion. Arsenic, another known cancer-causing agent, was found at concentration 75 times higher than residential standards. Tests revealed elevated levels of heavy metals and volatile organic chemical associated with petroleum products. Ten PAHs were found on Agricultural Street, designated a Superfund site, with benzo (a) pyrene at concentration 2.7 times higher than EPA residential standards. The arsenic level in the Morrison Road area was 13.3 times higher than EPA residential standards.

RESPONSES BY BEVERLY WRIGHT TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. Dr. Wright, according to the Louisiana Contractor's Licensing Board, the number of applications for a contractor's licenses nearly doubled in September, from 120 to 224. In the first week of October, the number of applications increased an additional 300 percent. Do you believe it is necessary to limit contractor liability for injuries to ensure enough contractors are interested in the billions of dollars of post-Katrina contractor work?

Response. No. According to Charles G. Marceaux, the executive director of the Louisiana's Contractor Licensing Board, for the 8 months ended August 31, 2005, application volume averaged 183 per month. For the period September 1st through October 14th, 2005, applications surged to 540 per month. Thus, there is no reason to limit contractor liability for injuries to ensure enough contractors are interested in the post-Katrina contractor work due to the fact that the LA Contractor Licensing Board has seen such an overwhelming demand for contractor licenses!

Question 2. Dr. Wright, I believe that you have experience with worker protection issues. In your experience, is preventing injuries so impossible that contractors must be relieved of responsibility for negligence to ensure cleanup work gets done? Also, is work more likely to be done properly or do we risk further damage if negligence is considered acceptable in Government contracts?

Response. No. S. 1761 would immunize contractors from liability for personal injuries or property damage in most cases. This would be unfair to the victims of contractor wrongdoing and would burden the Federal Government with the cost of any personal injuries and damages caused by contractors. In addition, we'd risk further damage to worker health and safety and the environment if there was no negligence standard in Government contracts. The bill would immunize contractors by improperly expanding the Government Contractor Defense far beyond its traditional purpose, turning it into a blanket immunity provision for most cases. Government Contractor Defense is appropriate only if in fact it was the Government's negligence that caused the injury. The defense generally applies only if the Government provides "precise specifications to which the contractor must adhere"—such as specifications for manufacturing military airplanes. The Government instructions must be very specific, mandatory, and nondiscretionary.

Section 5(d) of this bill would create a presumption that all elements of the Government Contractor Defense are satisfied by nothing more than a finding that the Army Corps' Chief of Engineers certified the contract as necessary for disaster recovery (or the contract is a subcontract to a certified contract and not expected to exceed $10 million). That presumption can only be overcome by evidence that the contractor acted fraudulently or with willful misconduct in submitting information to the Chief of Engineers at the time of the contract. In other words, the defense will almost always apply to disaster contractors.

Question 3. Dr. Wright, S. 1761 eliminates the right of private parties to bring claims under the environmental laws. Such claims could include situations where contamination ruins drinking water supplies. What does this exemption mean to the people in the New Orleans community where you are from? What do you think these changes in the law will mean to the future reconstruction of New Orleans?

Response. S. 1761 ignores this basic reality and principles of fairness; instead, the bill proposes to exempt contractors from citizen suits brought under Federal environmental laws. Specifically, the bill would bar any citizen suit against a contractor under the Clean Water Act, the Oil Pollution Act, the Resource Conservation and Recovery Act, Superfund and numerous other Federal laws. This means that citizens could not hold contractors responsible if they illegally discharge polluted wastewater or oil into rivers or wetlands, illegally dumping hazardous waste or burning toxic materials. Even where the contractor's actions constituted negligence or recklessness, citizen suits under these statutes would be barred.

People of color and low income communities in New Orleans are disproportionately exposed to toxic sites. The Mississippi River Chemical Corridor, between Baton Rouge and New Orleans, contains about 140 petrochemical plants, six oil refineries and numerous state and national Superfund sites.

If this bill is enacted, the citizens of New Orleans will be slammed with yet another man-made another disaster. This disaster will appear insidiously after citizens would have spent more of their limited assets trying to rebuild New Orleans only to find that the construction was shoddy and dangerous due to whole sale waiver of contractor's liabilities.

RESPONSES BY BEVERLY WRIGHT TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Dr. Wright, how would S. 1761 impact low income and minority communities in the Gulf Coast Region?

Response. Under the pretext of aiding the recovery of hurricane-ravaged areas in the Gulf Coast, S. 1761 would put the public at greater risk by removing important deterrents against irresponsible conduct that harms public health or environmental safety. These deterrents, in of themselves, are not usually adequate to protect the public from environmental injustices. With the existing deterrents, environmental injustices have continued to plague the New Orleans and Gulf Coast region for decades. For example, the 85-mile stretch of the Mississippi River between Baton Rouge and New Orleans—the "Louisiana Petrochemical Corridor"—is home to more than 140 oil refineries and chemical plants, accounting for one-fourth of the nation's petrochemical production. These factories have for decades spewed a toxic brew of pollutants into local communities. Just in the state of Louisiana, more than 50 percent of all residents who live within 3 miles of a refinery are African American. Routine operations at these plants and risky past and present waste disposal practices are what provided the ingredients to contaminate the toxic mud that now fills New Orleans' streets. With S. 1761's proposed waiver of contractor's liabilities around Katrina activities, those who are most at risk, low income communities of color, will only face further environmental hazards as there will be less incentives by contractors to protect public health and environmental safety. During times of natural disaster are when disproportionately impacted communities need public health and environmental protections the most.

Question 2. Dr. Wright, how will S. 1761 impede rebuilding efforts in the Gulf Coast Region?

Response. See answer to question No. 3 from Senator Boxer.

RESPONSE BY BEVERLY WRIGHT TO ADDITIONAL QUESTION FROM SENATOR THUNE

Question 1. In your opinion, are there any instances where special procedures will need to be used for emergency environmental cleanup?

Response. Yes. Of particular concern are toxic "hot spot" sites that were impacted by Katrina. Big industrial facilities, Superfund sites, and other toxic hotspots should be far more carefully investigated, with comprehensive sampling and on-site analysis. During cleanup, special attention and priority should be devoted to dangerous releases from these sites should be contained immediately, and longer-term cleanup planned, initiated, and budgeted.

Specifically, as you know, the flood waters that inundated these regions carried a mixture of soil, sewage, and industrial contaminants. The flood waters left behind a layer of sediment—in some places several feet thick—that still covers vast areas, including many neighborhoods in which family's have already returned to live.

Authorities must immediately remove surface sedimentation from public and private areas in the affected flood areas, as well as from hotspot contamination sites such as the Agriculture Street Landfill, and the areas surrounding the former Thompson-Hayward pesticide facility. In doing so, FEMA should utilize EPA's screening levels for soil quality, adjusted to take into account all likely routes of exposure in light of ongoing construction, demolition, and cleanup activities which will unquestionably create more of an inhalation risk than is covered by EPA's standards. In addition, we urge use of the most recent and scientifically sound cancer risk estimates for arsenic ingestion from the National Academy of Sciences' 2001 report, available at www.nap.edu/books/0309076293/html.

Finally, a uniform Federal standard must be employed by EPA in gauging environmental health risks in areas affected by Hurricane Katrina and Rita. EPA's current reliance on differing state standards is at odds with EPA's oversight responsibility under the currently activated National Contingency Plan within the Hurricanes Katrina and Rita Federal disaster areas. This is most apparent when the EPA utilizes, without any opportunity for public comment or input, environmental health criteria far less stringent than Federal safeguards.

STATEMENT OF WARREN PERKINS, VICE PRESIDENT, RISK MANAGEMENT, BOH BROTHERS CONSTRUCTION COMPANY

Thank you, Mr. Chairman, for the opportunity to address you and the other members of this Subcommittee. My name is Warren Perkins, and I am a Vice President

of Boh Bros. Construction Company (hereinafter "Boh Bros."). I serve as the company's Risk Manager.

I am here today to express the company's views on the matters before this Subcommittee, but as I begin, let me just say a few words for and on behalf of the Mr. Robert S. Boh, who serves as the company's President. Mr. Boh wanted to be here today, to personally represent the company, and he deeply regrets that he cannot. He asks you to appreciate that he simply cannot leave the scene of the great devastation that Hurricane Katrina has wrought on the Gulf Coast and New Orleans, in particular. There is simply too much to do.

Boh Bros. is a general construction contractor native to Louisiana and based in New Orleans. It is closely held, 96 years old, and currently in its third generation. It is a union contractor that works under collective bargaining agreements in Louisiana. It is, however, large enough to perform civil work throughout Gulf Coast, building bridges, paving roads, constructing underground drain and sewer systems, driving pile, and erecting levees and other and flood protection systems.

Boh Bros. and its employees are among the many victims of Hurricane Katrina. The company lost equipment and its work was interrupted. The hurricane shut down all of its projects in the Greater New Orleans area, and even today, only a handful of those projects have resumed. Many are in jeopardy of being canceled.

Moreover, as the storm approached, all of the employees in the Greater New Orleans area had to evacuate to other locations. I had to move my family to an Aunt's house in Montgomery, AL, and for three weeks, I had to work out of an office setup for me in downtown Montgomery. When I finally returned to New Orleans, I learned that a foot of water had flooded my home. I have been living in and working on my home ever since, and commuting to Baton Rouge daily.

As soon as the storm passed, Boh Bros. started scrambling to locate its people, to ensure that they were safe, and to let them know that we were temporarily moving our headquarters to our small office in Baton Rouge. We posted an emergency notice on our company web site; we set up temporary e-mail addresses for our office people; and we began calling people on their cell phones, trying to locate as many as possible.

It took a week for us to locate just 50 percent of them. It also took several days and several helicopter rides over New Orleans to assess the condition of out main office, equipment yard and job sites, and the damage done to the city as a whole. Before Katrina hit, Boh Bros. had over 180 pieces of equipment worth over $60 million in the Greater New Orleans Area, and it took us two weeks to recover just 50 percent of that equipment. Many pieces were damaged, destroyed or lost.

During that time, we also set up a "command center" where we received emergency calls for recovery operations, including emergency repairs to the breached levees. Each morning at 7:00 a.m., our President met with our field department leaders and project superintendents to plan the coming day's activities and share information on any new developments. While we were cramped into our Baton Rouge quarters, and lacked our computer and other basic systems, we were determined to get the job done. We worked 15 to 20 hours per day, and 7 days a week, for an entire month. We knew we were one of the few companies capable of providing emergency service to our community. We were also committed to getting our employees paid, and to keeping them secure.

Some of the first phone calls came from the Louisiana Department of Transportation and the U.S. Army Corps of Engineers. We were asked to deploy personnel and equipment to the downtown area, and to stop the flooding. By the end of the first week, we had received more than ten requests from Government agencies to fill breaches in the levees, to pump water out of the flooded areas, to move barges blocking parts of the inland waterway system, and to repair bridges over those waterways. We trusted the people calling us, and so we immediately went to work. We did what we had to do.

In the following month, we received many more calls from Government agencies. We also bid for and were awarded a contract to repair of the I-10 Twin Span bridge over Lake Pontchartrain, which runs between New Orleans and Slidell, and which the storm surge had severely damaged. We were told we had 45 days to get two-way traffic moving on one span, and I am extremely proud to tell you that we did it in 29 days.

For the first few days, our temporary headquarters was chaotic, with 200 employees working in an office that normally housed only 40 employees. But we persevered. We were often acting on oral instructions, but determined to be faithful to those instructions, because we knew that the Government agencies could not do it on their own. It was all about taking orders and then following them, to the letter.

To get to the areas that needed our help, we had to find access routes through flooded streets and around both debris and power lines. We had to set up supply

lines outside the area capable of providing our people with literally everything they needed, from water to food to fuel.

We also had to do our very best to protect our people from environmental and other hazards. We made sure to comply with all OSHA and maritime regulations, but that was just the beginning. As soon as we could, we hired two engineering companies to do environmental testing of our worksites before we moved our people into them. We talked to industrial hygienists about the personal protective equipment we should use. We had all of our people vaccinated for Hepatitis A & B and gave them Tetanus and Diphtheria shots. We even hired security guards to protect our people from the sniper activity encountered in and around the areas where they had to work. All of our guards were former members of specialized forces in the military.

In the early days, we were ready to start working on little more than a handshake. We did not demand the time we would normally take to scrutinize contractual terms and conditions. We were ready to go. We knew that we were incurring great expenses, and that we would have to meet our payroll, but we expected the Government agencies eventually to sign the contracts, and we trusted them to pay us fairly. The U.S. Army Corps of Engineers had come to the Shaw Group, another Louisiana firm, and Boh Bros., the most qualified and capable construction contractors in the area, asking for our immediate help, and we were not going to let the country down.

Nor did we dwell on the risk of tort litigation. We knew that the trial lawyers were out there, but we simply could not take the time to imagine that someone would sue us for trying to save the city. The only risk on our minds was the risk that New Orleans would simply cease to exist.

Now, however, we wonder. Do we risk tort litigation over the actions that we have taken, and continue to take? Would the trial lawyers really sue us simply for trying to put our community back together? Some people disagree with the contracting and regulatory agencies, and believe that the agencies are not doing enough. Would such people actually sue us simply for following the agencies' instructions, or relying on their conclusions?

We understand that the contracting agencies have to guide and direct the recovery effort. If we fail to follow their instructions, we expect to have a problem. We also have to answer to the Environmental Protection Agency, the Occupational Safety and Health Administration, and other regulatory agencies. If we fail to comply with their standards, we expect them to take to take some kind of enforcement action. We also expect and intend to provide financial support for any employees injured during the course of their employment, and to pay their medical bills. As required, we carry and continue to pay the premiums for workers compensation insurance, and we know that those premiums will climb if we fail to take the steps necessary to safeguard our workers.

The problem is that we cannot be sure that the agencies are in charge. The problem is the future tort litigation could rewrite the rules, long after the fact.

Boh Bros. has simply responded to the many requests that the U.S. Army Corps of Engineers and other Government agencies have made of our company. At their request, and as they instructed, we have, for example, made temporary repairs to New Orleans' flood protection system. These temporary repairs are intended to protect the city only for a short time, as the Corps and other Government agencies develop and implement permanent solutions to the many problems that Hurricane Katrina revealed. But we really do not know how much time the agencies will require. The time could stretch into the 2006 hurricane season and beyond. If a future hurricane breached any one or more of these temporary repairs, would the trial lawyers sue the Government agencies or Boh Brothers?

The exposure is real, even if, as we are confident, our work meets all relevant standards. Litigation takes an enormous toll on any company. The costs of litigation are enormous. They include both legal and expert witness fees, and a host of indirect expenses. Time is lost. Employees are distracted. Insurance carriers may hesitate to provide future coverage. And all too often, a company's reputation is both wrongly and irreparably damaged.

Since the hurricane hit New Orleans, the trial lawyers have already filed one meritless class action against Boh Bros. While based on events that preceded the hurricane, it is highly instructive. It demonstrates that the trial lawyers are already hoping to profit on the disaster, and it reveals some of the potentially great costs involved in simply being sued. The complaint alleged that Boh Bros. had defectively constructed a bridge that is very close to the area where the 17th Street Canal floodwall failed, and that we were therefore responsible for the flooding of an entire neighborhood. The potential liability was enormous. In fact, our company did not even work on the bridge. The plaintiffs' attorney did no research to determine the facts. He simply assumed that Boh Bros. must have been involved. The complaint

was quickly dismissed. But not until the plaintiffs' lawyer had gone on the evening news to make his sensational allegations and cause lingering damage to our good name and reputation.

When asked to do the right thing, for New Orleans and its residents, Boh Bros. responded. Now, it is time for Congress to do the same. Now it is time for Congress to give the contractors working hard to revive New Orleans and the remainder of the Gulf Coast with some reasonable measure of protection from unlimited tort liability simply for being there to meet the need. Congress should quickly enact S. 1761.

Boh Bros. is a member of the Associated General Contractors of America, and I can assure you that responsible contractors throughout the country are playing close attention. They are aware of what has happened to the contractors who responded to the terrorist attacks on New York City. They are aware of the litigation that followed. They are responsible corporate citizens, but they are deeply concerned. If they cannot rely on the instructions that contracting agencies give them, or the guidance that regulatory agencies provide, they may find it hard to respond to the next natural or other disaster.

In closing, let me just add that the Greater New Orleans Area requires your particular attention, as it heavily depends, for its very survival, on the design and construction of a new flood protection system. For itself, its employees, and its community, Boh Bros. also urges you quickly to provide enough funding to design and construct a flood protection system that will protect the city from future hurricanes. In our opinion, if proper funding is not quickly provided, many of the city's residents will neither return nor rebuild.

Thank you again for providing Boh Bros. with an opportunity to testify. I would be glad to answer any questions you may have.

RESPONSES BY WARREN PERKINS TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. Mr. Perkins, the Washington Post reported on September 20th, that a contractor's trade group, the Association of General Contractors of America, was drafting legislation to shield contractors from claims by workers. I believe that you company is a member of this trade association and the President of Boh Brothers was quoted in the article in support of this legislation.

Did Boh Brothers or the General Contractors of America participate in the drafting of S. 1761 under discussion? If so, please specifically describe how?

Response. I believe that you are referring to the Associated General Contractors of America, the oldest and largest of the nationwide trade associations in the construction industry, commonly known, throughout the country, as "AGC."

As a threshold matter, I would certainly hope and expect that any member of Congress contemplating legislation on or relating to the construction industry to solicit AGC's views on such legislation. A nonprofit corporation founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 32,000 firms in more than 98 chapters throughout the United States. AGC members include more than 7,000 of the nation's leading general contractors, 11,000 specialty contractors and 13,000 material suppliers and service providers to the construction industry. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities and multifamily housing units; and they prepare sites and install the utilities necessary for housing development. Among AGC's members are literally thousands of both union and open shop contractors. While it represents and serves the nation's largest construction contractors, the vast majority of its members are small businesses. I simply cannot think of a better place for any member of Congress to go for a fair and balanced view of how Federal legislation would be likely to affect the construction industry as a whole.

I am pleased to confirm that Boh Bros. has long been an active member of both AGC and its Louisiana chapter, that my company has encouraged AGC to support S. 1761, and that AGC has expressed such support. I am, however, confused by your reference to legislation that would "shield contractors from claims by workers." I am not aware of any such legislation.

In its article, the Washington Post referred to something that would "limit [contractors'] liability from lawsuits," but of course, the workers compensation statutes in all 50 states and the District of Columbia already substitute a no-fault compensation system for the litigation that might otherwise arise out of any injuries or illnesses that construction workers suffered in the course of their employment, and S. 1761 expressly provides that it does not apply to "any claim for loss under any workers compensation statute." Some workers compensation laws do permit employ-

ees to sue their employers under extenuating circumstances, but S. 1761 also provides that it shall not "affect[] the liability of any person or entity for recklessness or willful misconduct."

In sum, it is one thing to limit contractor's liability from lawsuits and quite another to shield them from workers claims. It is one thing to support S. 1761 and quite another to diminish workers' rights. Boh Brothers supports S. 1761 on the understanding that it does not diminish workers rights, and in a press release announcing its support for the bill, AGC expressed the same understanding that "[a]ll environmental, safety and health, labor and ethics laws would continue to apply."

Boh Bros. did not participate in the drafting of S. 1761, either directly or through AGC. I would assume that AGC communicated its support for such legislation to Senator Thune, but I was not involved in any meetings or other communications with the Senator, and I cannot say whether or to what extent he relied on any information that AGC did provide.

Question 2. Mr. Perkins, you indicated in your testimony that you did your best efforts to protect people from environmental and other hazards in your New Orleans cleanup efforts. The bill, S. 1761, would relieve your company of its liability if it is negligent and injures people or property.

Are you concerned that Boh Brothers' best efforts are no better than negligent performance, and do you now believe that Boh Brothers must be shielded as a result?

Response. In my testimony I referred to protecting "our people from environmental and other hazards". I was referring to protecting our employees. As stated above, Bill S. 1761 has nothing to do with relieving our company of its liability and responsibility to our employees. In the testimony Senator Boxer has referenced, I was simply painting a picture of the hazards Boh Bros. faced in order to respond to the emergency calls for help to seal the levee breaches, to restore the pump system, to dewater flooded areas, etc.

S. 1761 would limit Boh Brother's risk of liability to private third parties only for work that the Government requested, directed and controlled, and expressly found necessary for the Gulf Coast's recovery from Hurricane Katrina and future such catastrophes. The bill would not apply to any or all of my company's activities, even in New Orleans, nor would it apply to any or all activities of other recovery contractors on the Gulf Coast.

Nor would it excuse any failure to meet the Government's expectations. Quite to the contrary, my company would still have to satisfy all terms and conditions of all Government contracts, and to comply with all Federal, State and local regulations that apply to the work, including but not limited to all environmental, safety and health regulations, and all employment laws. The Government would retain tight control.

The problem is that meeting all of the Government's expectations will not be enough to protect my company from tort liability, much less litigation. As things stand today, my company can fully perform all Government contracts for the recovery of the disaster zone, and it can do so to the Government's express satisfaction, and in full compliance with all regulatory requirements—and still incur liability for "negligence." As we heard at the hearing on November 8, 2005, over 5,000 lawsuits have been brought against the contactors that responded to the attacks on the World Trade Center, and yet, to the best of my knowledge, not one of the contracting or regulatory agencies has found fault with their practices. The tort system has left juries free to set different standards, or to reinterpret existing standards, or to second-guess what these contractors "should have known," long after the horror of the 9/11 disaster has passed, and memories have faded. In New York, the Occupational Safety and Health Administration obviously thought that it was enough for every contractor to provide a respirator to every worker. At the hearing, it was seriously suggested that the contractors should have gone further, and indeed, that they should have physically forced not only employees but also third parties who refused to wear their respirators off of the site.

By all accounts, Hurricane Katrina was an unprecedented event. It was unlike anything that this country had ever seen. Just how was a "reasonable person" supposed to respond to the facts on the ground? Just what was it that such a person "should have known"? Moving construction workers and heavy equipment into New Orleans was and is a far cry from driving a car down a highway. The rules of the road to New Orleans recovery were are far from clear.

Yes, I am concerned that someone far removed from the actual disaster might decide at some point in the future that my company's best efforts were not enough. At the leisurely pace of a jury trial, with the benefit of hindsight, comfortable in the knowledge that my company's assets are the only thing at stake, and with an understandable sympathy for someone who has suffered a loss, a jury might decide

that my company should have know something that it did not know, or to use your pejorative phrase, that even my company's best efforts were "no better than negligent performance."

I am even more concerned that the cost of defending my company against allegations that it was "negligent." It would cost tens if not hundreds of thousands of dollars to defend my company against such allegations. Even if, as I believe, my company did everything that anyone can expect of a "reasonable person," the cost of making that point could be enough to drive my company out of business, not to mentions the thousands of small and minority-own businesses in the Gulf Coast.

RESPONSE BY WARREN PERKINS TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. Mr. Perkins, in your testimony, on page 5, you state that: "The problem is that we cannot be sure that the agencies are in charge. The problem is that future tort litigation could rewrite the rules, long after the fact." Please clarify what you mean by these statements.

Response. The tort system is entirely independent of the contracting and regulatory agencies responsible for directing and overseeing the response to a major disaster, and the tort system is therefore free to second-guess any direction or guidance that the contracting and regulatory agencies give to the contractors actually on the ground, undertaking search and rescue, repairing public infrastructure, remediating polluted areas or removing debris. It follows that the recovery contractors cannot take the agencies' direction, or rely on their guidance, without risking tort litigation and perhaps liability. Whatever the agencies say today, a jury might later say that the contractors should have done something differently.

As explained to Senator Boxer, a construction contractor can fully perform all Government contracts for the recovery of a disaster zone, and it can do so to the Government's express satisfaction, and in full compliance with all regulatory requirements—and still incur liability for "negligence." As we heard at the hearing on November 8, 2005, over 5,000 lawsuits have been brought against the contractors that responded to the attacks on the World Trade Center, and yet, to the best of my knowledge, not one of the contracting or regulatory agencies has found fault with their practices. The tort system has left juries free to set different standards, or to reinterpret existing standards, or to second-guess what these contractors "should have known," long after the horror of the 9/11 disaster has passed, and memories have faded. In New York, the Occupational Safety and Health Administration obviously thought that it was enough for every contractor to provide a respirator to every worker. At the hearing, it was seriously suggested that the contractors should have gone further, and indeed, that they should have physically forced not only employees but also third parties who refused to wear their respirators off of the site.

Under these circumstances, contractors have to hesitate. The have to pause and reflect on the direction and guidance that Government agencies are giving them, and to decide, case-by-case whether to do what they are told. What FEMA or the Corp of Engineers now finds critical to do, a jury could later find to be "negligent." And what the agencies lose is their power to control an emergency situation.

STATEMENT OF MICHAEL FEIGIN, EXECUTIVE VICE PRESIDENT, BOVIS LEND LEASE

Mr. Chairman, I would like to thank you, Senator Boxer and the committee for inviting me to participate in today's panel, allowing me to discuss my company's experience after the terrorist attacks on the World Trade Center on 9/11. My testimony today will outline our company's response to the immense tragedy that occurred and offer perspective on the pitfalls and hazards with recovery and cleanup efforts following both terrorist and natural disasters.

Natural disasters are impossible to prevent but proper planning is the essential element in coping and rebuilding following their occurrence. The proposed legislation we are discussing today, S. 1761, the Gulf Coast Recovery Act, addresses some of the problems following hurricane Katrina. I hope to draw upon the knowledge we gained through our 9/11 experience to draw parallels to Katrina and future natural disasters and encourage this committee to take into consideration the role private businesses play in helping Government with disaster relief.

Supporting the needs of communities, Governments, commerce and industry on a local, national and multinational level, Bovis Lend Lease ranks among the world's leading project and construction management companies. In the United States of

America, Bovis Lend Lease is the nation's second largest construction manager with coverage emanating from its 20 United States offices and in Latin America.

I begin with a quote from our CEO at Bovis Lend Lease, Peter Marchetto "At "Ground Zero", we saw "all the worst that you could imagine and all the best you could ever see."

At 1 p.m. on September 11, 2001, approximately 5 hours after the first attack, Pete received a call from the department of Design and Construction of the City of New York (DDC). They wanted Pete, together with a few others from Bovis Lend Lease (BLL), to come to what was being called Ground Zero to help DDC manage the daunting task of making sense of the chaos in an effort to save lives. Without a moment's hesitation, Pete and other members of BLL went to help.

That afternoon, BLL employees were working hand in hand with, and under the oversight of, the NYC DDC and the Office of Emergency Management. BLL and subcontractors retained by BLL on behalf of the City of New York, supplied labor, materials and equipment at "ground zero" for 9 months.

Shortly after September 11, in addition to its work at Ground Zero, BLL answered the call for help from the city's Economic Development Corporation by completing the Family Center at Pier 94 (this facility houses the Red Cross, NYPD, Medical Examiner and many others), a Command Center at Pier 92 and ferry slips at Pier 11. All of this work was done in three days or less and completed on Sunday, September 16.

Our debris removal work in the World Trade Center area included, at different times, search and rescue efforts, removal of debris, demolition work, construction of temporary structures and netting and scaffolding. BLL and the three other contractors asked to work at Ground Zero—Turner Construction, AMEC Construction and Tully Construction—each worked in a quadrant of Ground Zero. BLL began working in an area in the South West quadrant of "ground zero" that included the South WTC Tower and the Marriott Hotel.

By January of 2002, DDC decided to assign a larger role in the management of demolition and construction operations at Ground Zero to an alliance between BLL and AMEC Construction, and to abandon the quadrant system. Tully Construction stayed on as a subcontractor to BLL and AMEC, and Turner left the site.

The initial estimates by DDC and the Federal Government were that the recovery efforts, debris removal and site stabilization would take 2 years and cost over $1 billion. The Contractors and others finished the work in 265 continuous days, 24 hours per day. The Labor force peaked at 2,300 (including uniform services), and was stable at 1,700 for much of the period, which included about 250 Bovis personnel. BLL was particularly proud that we had no fatalities and only 36 reportable accidents with over 3.2 million man-hours worked.

No consideration was given by the Contractors to liability issues or potential claims or lawsuits before beginning work on September 11. When asked to perform work on any other project, any one of these contractors would have been given the time to properly analyze the situation, the risks associated with the assignment, and the methods to manage those risks. The Contractors also would have determined how to insure whatever potential liability might arise. There was no time to do this before starting work at Ground Zero. Immediate response was necessary.

It soon became apparent that these liability issues would have to be addressed. However, given the dangerous conditions, the retroactive nature and the unknown aspects of this unprecedented effort, commercial insurance companies would not provide the coverage needed and ultimately only limited coverage was obtained.

After many months of work, discussions with many members of Congress from the New York delegation and our two New York Senate members, we received a commitment from Congress to fund a Captive Insurance Program for a broad range of third party liability claims including general liability, environmental liability, professional liability and marine liability. The Captive was funded with a one time paid in premium of $1 billion. After many months working with FEMA to establish the details of the program, the WTC Captive was formed. This WTC Captive Policy provides coverage for the City of New York as the Named Insured, and all of the contractors, subcontractors, architects and engineers working at Ground Zero as Additional Named Insurers. The policy currently has approximately 140 Additional Named Insures.

The Captive was funded at $1 billion because this was the quickest agreeable amount to get a program in place. Some now claim that even the $1 billion might not be enough. A significant number of claims have been filed against the Contractors. Today, there are claims from over 5000 individual claimants. These lawsuits claim injuries arising from or related to debris removal work at the WTC site following the collapse of the buildings on September 11, 2001. The cases predominately involve allegations of respiratory and related injuries including asthma, chronic

cough, chronic obstructive lung disease, pulmonary fibrosis, and fear of cancer. As provided for in the Captive policy documents, the Captive has retained lead defense counsel for the City and the Contractors and is vigorously defending these lawsuits.

It is essential that the United States be prepared to respond immediately in cases of national emergency, whether it is natural or man made disaster. The sad events of 9/11 and the recent events in Louisiana make this painfully clear. What we have learned from our experiences at Ground Zero is that the response to these disasters cannot wait until the disaster occurs. Resources must be put in place long before a disaster for response to be swift and adequate. A disaster response infrastructure must be put in place with experienced, qualified oversight and the ability to call upon local resources as required. An essential element of such preparedness is a plan to protect those who respond from liability.

BLL did receive compensation for its work at Ground Zero. But for the WTC Captive, expenses for lawyers and consultants would have exceeded any fees made in a matter of months. As a result of these ongoing expenses and potential liabilities, we would probably lose our bonding lines, our banking support and our insurance coverages. In short, responding to a disaster when called would have taken a thriving business employing over 2,500 people in 20 States and Latin Americas and put us out of business. Every company responding to a disaster without some kind of protection faces the same choice.

We cannot say in hindsight that we would not respond if called upon again in a similar situation. When people's lives are at stake, we will do our duty. What we can say is that we will not voluntarily go into such a situation again. We will not extend ourselves, but we will respond if asked. With our experience at Ground Zero, and the potential liability we now face, we would be foolish to do otherwise. We have put our business, our livelihood, and our families' prosperity on the line to help people and do the right thing. While we think existing law offers a shield in this area, the current World Trade Center related litigation demonstrates the need for additional clarity not only to protect the Contractors from liability, but also to eliminate or discourage the costly and time consuming process of the litigation itself except in extreme cases. Protection from liability needs to be put in place to eliminate any question of response, and avoid penalizing companies that come when called. S. 1761 bill does this and requires the support of this committee.

Mr. Chairman and members of the committee, thank you for the opportunity to speak with you today about Bovis Lend Lease experience and I submit my written testimony for the record and look forward to any questions you may have.

RESPONSES BY MICHAEL FEIGIN TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. Mr. Feigin, did Bovis conduct its own environmental testing at the World Trade Center? Did you conclude that any special worker protections were warranted?

Response. Bovis worked closely with the City of New York, State and Federal agencies and other entities throughout the course of Bovis' work at the WTC site and/or related locations as environmental data was collected, reviewed and used to make decisions and recommendations regarding worker safety issues—including the types of personal protective equipment to be used by workers. For example, Bovis worked closely with numerous City, state and Federal agencies and others regarding an Environmental Safety & Health plan for the WTC site and/or related locations and regarding an OSHA Partnership Agreement—as applied by the city, State and Federal agencies and other entities, these plans identified the nature and types of worker protections to be used at the WTC site and/or related locations.

Question 2. Mr. Feigin, do you believe that performance no better than negligence is the standard most appropriately applied to cleanup contractors?

Respones. There are various standards of behavior or action that potentially may be applicable to contractors performing different types of tasks in different environments. There are standards or regulations applied by local, State and Federal law regarding workplace safety, environmental hazards, construction, demolition, and a host of other activities that could be involved in a "cleanup" situation. In addition, the emergent nature of the situation and/or the activities involved and the environment in which those activities are to be performed also could affect the standards which a governing body or court may find were or were not applicable or relevant in a particular situation or context. Assuming that the question is directed to the standard typically applied by a court of law in determining liability for a person or company's actions and understanding that the factors just discussed may affect a court's determinations in this regard, it is correct that the tort theory of negligence typically is used. Which approach is appropriate in an extreme "cleanup" situation,

as was faced in the aftermath of Hurricane Katrina or the WTC disaster, cannot be determined without a complete analysis of the specific situation and the applicable law and/or standards.

Question 3. Mr. Feigin, do you believe that workers who can prove that they were injured due to a company's negligence should not be able to get compensated for their injury in connection with a declared disaster as described in S. 1761?

Response. I do not understand that S. 1761's purpose is to prohibit workers injured as a result of a company's negligence from getting compensation for their injuries. Rather, I understand that S. 1761's purpose is to provide protections to contractors who answer the Government's call for help and provide immediate assistance in times of catastrophic emergency. A private contractor's rapid involvement in responding to an emergency often comes at the request of a Governmental entity because the Government is unable on its own to accomplish tasks such as debris removal and/or cleanup or other efforts related to the public health and safety. Legislation (such as S. 1761) is needed that provides further protection to Government contractors from the risk of liability from such emergency response and that eliminates the costly and time consuming process of litigation over that statutory protection.

Question 4. You indicated in your testimony that there were a total of 36 reportable injuries in connection with the Ground Zero site. Please describe the nature and extent of all accidents and injuries and how you determined if an injury was reportable. Please also provide copies of all accident and injury reports in connection with or related to work at Ground Zero in New York.

Response. In my prior testimony, I indicated that there were "only 36 reportable accidents with over 3.2 million man-hours worked—" This information was obtained from an OSHA Trade News Release dated April 12, 2002 and entitled "Injury and Illness Rate at World Trade Center Site Nearly Half National Average for Similar Sites" which reflects that there were only 35 workers at the World Trade Center Site that suffered injuries resulting in lost workdays. My earlier reference to 36 such accidents apparently was the result of a typographical error. I understand that the parameters regarding what is to be classified as a "reportable" injury for OSHA purposes is set forth in OSHA regulations and guidelines.

RESPONSES BY MICHAEL FEIGIN TO ADDITIONAL QUESTIONS TO SENATOR JEFFORDS

Question 1. Mr. Feigin, have any of the lawsuits filed against your company related to cleanup of the World Trade Center involved claims by private parties for damages resulting from environmental pollution or adverse health effects from pollution?

Response. Bovis is not aware of any lawsuits against it relating to its work at the World Trade Center Site and/or related locations which involve claims by private parties for damages (either property damage or personal injury) resulting from alleged environmental pollution. The lawsuits filed against Bovis and others regarding the debris removal and cleanup operations at the World Trade Center Site and/or related locations include allegations by individuals of personal injuries allegedly resulting from inhalation and/or exposure to airborne and/or surface contaminants present at those locations. As such, those personal injury cases do not appear to allege adverse health effects from environmental pollution.

STATEMENT OF JOEL SHUFRO, EXECUTIVE DIRECTOR, NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY AND HEALTH

My name is Joel Shufro and I am the executive director of the New York Committee for Occupational Safety and Health (NYCOSH), a non profit educational organization dedicated to every workers' right to a safe and healthful workplace. We have a 26 year history of providing quality safety and health training and technical assistance to working people, unions, employers, Government agencies, and community-based organizations about how to recognize and eliminate workplace health hazards. Since the attack on the World Trade Center, NYCOSH has worked with these constituencies to evaluate the environmental and occupational health consequences resulting from the release of dust and fumes which contaminated Lower Manhattan. We have had extensive involvement with workers who participated in rescue, recovery and cleanup operations at the World Trade Center site, workers in offices surrounding Ground Zero, immigrant workers who cleaned offices and residences, utility workers who restored essential services to the area, and residents living in or returning to contaminated homes around Ground Zero.

We are here to oppose S. 1761, which exempts contractors from citizens' suits brought under Federal environmental law and immunizes contractors from liability for personal injuries or property damage in response to disasters. Our position is informed as a result the thousands of workers who have developed physical and mental illnesses in the aftermath of the tragedy at the World Trade Center, September 11, 2001.

To those involved in the rescue, recovery and cleanup, working at the World Trade Center site was more than a job. Those who responded to the disaster did so for many reasons: patriotism, altruism, and humanitarianism, among other motives. They responded to the needs of their country; many working 12 hours a day, 7 days a week for months. But they, like all workers, expected that those who employed them would provide them with safe and healthful working conditions and comply with Federal, State and city regulations. They assumed that if they were harmed as a result of working at the site, their medical needs would be taken care of and they and their families would not be driven into poverty. They believed that they would not be forced to give up their homes, and that their children would not have to drop out of college so medical bills could be paid.

Unfortunately, four years following the devastating attacks on the World Trade Center, respiratory illness, psychological distress and financial devastation have become a new way of life for many of the responders, office workers and residents in Lower Manhattan. According to statistics released by the Centers for Disease Control, workers and volunteers continue to experience high rates of upper respiratory illnesses high rates of upper respiratory problems, sinusitis laryngitis and higher rates of lower respiratory problems-asthma, bronchitis, chest tightness, coughing and wheezing. In fact, the persistent cough is so unique it has been named the World Trade Center Cough. It is essential that you understand that these health problems were incurred not only by exposure to toxic substances in the dust cloud released at the time of the collapse of the twin towers. Rather it is likely that the majority of cases of adverse health effects were caused or exacerbated by exposure to toxic chemicals by workers and residents engaged in recovery and cleanup operations in the 10 or so months following 9/11. Many of these workers were either employed by Federal or private contractors.

Nor is the appearance of illness among workers who worked in the area following the September 11th tragedy and residents abating. According to Dr. Steven Levin, co-director of the World Trade Center Worker and Volunteer Medical Screening Program at Mt. Sinai, symptoms continue to appear among workers four years after exposure. Other workers, whose symptoms abated after initial onset, are experiencing re-current symptoms related to their initial exposure. Additionally, as Dr. Robin Herbert, also co-director of the WTC Worker and Volunteer Medical Screening Program at Mt. Sinai, points out there are, "grave concerns about their potential for developing slower-starting diseases such as cancer in the future. For many coming through our program, the fears of future catastrophic diseases like cancer, which can take as long as twenty to thirty years to show up, loom as large or larger than their acute ailments." These concerns have been heightened by the recent passing of two New York City Emergency Medical Technicians (EMT) whose deaths have been related to illness resulting from exposure to toxic substances at the World Trade Center.

Many of the workers are disabled by chronic pulmonary problems. Some are unable to work. In many cases, workers' lives have been significantly altered by breathing difficulties and the psychological consequences of their response efforts. Many have also suffered substantial economic disruption because of WTC-related health problems, do not have health insurance and are unable to pay for treatment or needed medicine. According to the doctors at WTC Screening Program at Mt. Sinai, who have seen the most diseased workers resulting from 9/11, many workers are without medicine, medical treatment and wage replacement.

What happened during recovery and cleanup operations at the World Trade Center was a preventable public health disaster. There is no doubt that the World Trade clean up was one of the most dangerous and complex construction sites in the history of the country. But, those who had management responsibility failed to provide workers with working conditions that protected their safety and health. They failed to provide workers with a "safe and healthful workplace, free of recognized hazards" as required by law. Rather than make a stronger commitment to protect workers and residents from environmental and occupational hazards in future disasters, the contractors are lobbying to pass S. 1761, which would free them from most liability for personal injury claims when engaged in responding to a major disaster such as Katrina, as well as from citizen suits brought under Federal environmental laws. We believe that such legislation would undercut any incentives contractors have to comply with safety and health and environmental regulations.

Federal contractors, who are paid by the taxpayers for the work that they do, should be held fully accountable to the public if they behave carelessly and cause harm to people or the environment. No public policy reason justifies a taxpayer subsidy for negligence or illegal activity. What S. 1761 does is to shift the cost of personal injuries and property damage from Government contractors to the workers and/or residents in the disaster areas.

It is imperative that workers know that, if they come to the aid of their country in disaster situations, contractors employed by the Government will be held to high standards which protect both the workers and the members of the community in which they are working. They need to know if they should be injured or contract an illness in the process, their medical needs will be taken care of and that their families will be secure. They need the guarantee that contractors who do not act responsibly will be held liable.

Responsible Government contractors should have no need of the sweeping immunity this bill would provide. We urge you to oppose this legislation, which would provide a windfall to irresponsible contractors at the expense of public health and the environment.

RESPONSE BY JOEL SHUFRO TO AN ADDITIONAL QUESTION FROM SENATOR THUNE

Question 1. It is my understanding that all fifty states, including New York, require employers to carry workers compensation insurance for their employees, and that, by law, such insurance must pay for any medical treatment that employees may need, as a result of any injuries or illness they suffer in the course of their employment. It seems that these workers compensation laws also require at least some wage replacement for people who cannot work. Is that essentially correct? And if so, how is it that the people who worked at Ground Zero cannot get medical treatment or wage replacement?

Response. Workers compensation is inadequate to provide workers and community residents with a remedy for the types of damages from which contractors are asking for relief in the proposed legislation (S. 1761).

First, workers compensation applies only to workers who are in an employer/employee relationship. By definition, workers who are not employed by the contractor who caused the harm, as well as residents and volunteers, would be excluded from receiving medical treatment or wage replacement for injuries or illnesses incurred as a result of the negligent actions of a contractor responding to a disaster situation.

Second, it is not true that workers compensation is mandatory in all jurisdictions. For example, coverage is optional in Texas.

Third, workers compensation systems do not allow workers to recover for a wide array of damages such as those which may occur as a result of work around disaster response, recovery and cleanup. For example, adverse reproductive health outcomes caused by exposure to toxic substances are not compensable under workers compensation; nor is an injured worker able to recover for pain or mental anguish or loss of companionship.

Fourth, medical coverage varies from State to State. This is particularly the case with occupational illnesses and diseases with long latency periods. Definitions of what constitutes an "occupational disease" also vary and may preclude workers from filing claims for job related illnesses. Diseases covered in one state may not be covered in another. In addition, what medical treatment and/or procedures are provided through workers compensation also varies dramatically State to State.

Fifth, wage replacement benefits also vary widely from State to State. Since disasters, such as Hurricane Katrina, often affect workers in more than one State, relying solely on workers compensation, results in significant inequities in the wage replacement workers receive. For example, the maximum weekly benefit is $400 in New York, $666 in New Jersey, $716 in Pennsylvania and $931 in Connecticut.

Sixth, many States have a cap on the length of time a worker can collect wage replacement for an injury no matter how long the disability lasts or how severe the injury is. Consequently, a worker who is permanently totally or permanently partially disabled and unable to work may, after a defined period, face poverty and/or financial ruin and be forced onto welfare or social security disability.

Many workers who responded to the tragic collapse of the World Trade Center and who worked at or around Ground Zero were exposed to highly caustic dust and a plethora of toxic fumes. Many of these workers have developed respiratory illnesses.

These workers have had great difficulty in accessing medical and wage replacement benefits through the workers compensation system. Unlike workers who suffer traumatic job-related injuries, whose cases are relatively straight-forward, workers

who contract occupational diseases routinely have their cases controverted by insurance carriers. While their cases are being litigated, carriers will not provide either medical treatment through the workers compensation system or wage replacement payments. Furthermore, even if a worker has employer-paid or private health insurance, many health insurers will deny claims if workers indicate that their condition is work-related. Therefore, until their case is established, workers who file for workers compensation are denied needed medical treatment and wage replacement payments.

In New York State, as in many other jurisdictions, it can take years for contested occupational disease cases to be resolved. For example, a study at conducted at the Irving J. Selikoff Occupational and Environmental Medicine Cline at Mt. Sinai Medical Center of workers who filed claims as a result of musculo-skeletal repetitive stress injuries found that it took, on average, approximately 2 years from the time a worker filed a claim with the New York State Workers Compensation Board to the time that the case was established. For some cases, it took over four years after the claim was filed for it to be established. he consequence of such delays for injured workers are traumatic; claimants often are forced back to work resulting in further injury and/or experience other adverse health outcomes. Other workers, who have no financial reserves are forced into poverty. There are cases in which workers are forced to sell their homes or their children are required to drop out of college to help support the family.

Recent research has demonstrated that most workers who contract an occupational illness do not receive medical or wage replacement benefits through workers compensation. According to one study, workers receive compensation for less than 1 percent of all occupational disease claims. Rather, than receiving wage replacement from workers compensation, injured workers are forced to rely on state run welfare programs or social security disability, which are financed through general tax revenues, for sustenance and on programs like Medicaid for medical treatment. There are additional impediments which workers face when they apply for Workers Compensation which prevent many workers whose health has been impaired by work-related causes from receiving medical treatment. In New York State, as in many states, the workers compensation system is difficult to navigate without legal representation. However, there are certain classes of cases for which there are there are strong financial disincentives for attorneys to take cases which are not deemed profitable. These include more difficult cases such as occupational disease claims where causation is difficult to prove and cases where it is difficult to prove who the employer was or if the employer was uninsured (discussed above).

A significant number of workers who require medical treatment as a result of illnesses arising out of employment at the World Trade Center are still working. These workers will not be able to find legal representation because there no legal fees paid to lawyers in cases where there is no wage loss—cases known as "medical only." Without the help of an attorney, workers will not get the benefits to which they are entitled. Despite the need for medical treatment, these workers, many of whom are immigrants, many of these workers, who have legitimate claims will drop their cases out of frustration, discouragement, ignorance or fear of dealing with a litigious process which they neither understand and perceive as hostile.

By eliminating the ability of workers and residents to bring suits against contractors who are negligent in the performance of their contracts, the S. 1761 would prevent those injured by the negligent actions of contractors from holding them accountable, allowing them to cut corners and operate in a fashion which could endanger members of the public and residents. Since workers compensation is an exclusive remedy and prevents workers from suing their employer, workers would be unable to hold liable other contractors who may be operating on the same site who created hazards. It would also penalize those employers who comply with health, safety and environmental regulations. In complex response to disasters this would place workers at a serious disadvantage and undercut any incentive for employers to adhere to safety standards and protocol

---

RESPONSE BY JOEL SHUFRO TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. How did the managers of the contracting firms providing cleanup and recovery efforts at the World Trace Center fail to provide workers with working conditions that protected their safety and health?

Response. The attack on the World Trade Center on September 11, 2001 and the subsequent magnitude of the destruction and loss of life at the World Trade Center created an emergency response, rescue and recovery effort of enormous proportions. According to the head of OSHA, the World Trade Center site was "potentially the

most dangerous workplace in America." Although there were no fatalities on the job, there were a large number of serious injuries as well as thousands of workers who developed respiratory illnesses, some so severe as to prevent workers from ever working again and surely not as construction workers.

As noted by John Moran and Don Elisburg, leading construction safety and health experts, who issued a report for the National Institute for Environmental Health Sciences (NIEHS) entitled "Worker Education and Training Program Response to the World Trade Center Disaster: Initial WETP Grantee Response and Preliminary Assessment of Training Needs"

> The situation created a very complex safety and health setting in which there was confusion as to which occupational safety and health standards were applicable, whether enforcement agencies indeed had enforcement jurisdiction, and at what point in time the WTC Disaster Site Safety and Health Plan would become effective and operative."

The report based on observations from September 22-27, 2002 found:

> What emerged in this massive disaster and the protracted and complex response is the fact that rescue, recovery, and other activities have occurred in a scenario never anticipated by the safety and health legislation or the subsequent standards/regulations. The injury and illness reports for the initial weeks of the search and rescue activity were at unacceptable levels. Mover, the exposure data, as well as the potential for serious exposure to toxic materials (including asbestos) among the construction response workers, raises significant concerns.[1]

However, from the outset, worker safety and health took a back seat to production. While the pressure for such production was politically motivated, contractors did not provide working conditions which were protective of the safety and health of the workers they employed.

First, safety and health training of workers was woefully inadequate. From the outset, it was clear that workers would be exposed to a wide range of hazards. According to Moran and Elisburg, workers needed to be trained in, at least, the following areas:

- Asbestos
- Lead
- Confined Spaces
- General Construction Safety/OSHA-10
- Personal Protective Equipment
- Respirator Protection (and remaining requirements of 1910.134)
- Fall Protection
- HAZCOM
- Ergonomics[2]

Unfortunately, training of workers did not commence until 78 days after September 11th, in mid-to late November. However, the training was an abbreviated version of what was required by OSHA standards. In our opinion, the training was not sufficient to prepare workers to protect themselves for the wide range of hazards to which they would be exposed while working on the pile.

Second, despite the presence of a wide range of toxic substances, including dusts and fumes, fit- testing to wear respirators was not widely offered on the site until 36 days after September 11th. According to Bruce E. Lippy, CIH, CSP, the Director of Research and Special Projects for the Operating Engineers National Hazmat Program, who was on the site working with heavy equipment operators, "Compliance with respiratory protection was generally poor at Ground Zero, less than one-half, and sometimes less than one-third, of the heavy equipment operators were wearing their respirators while working on the pile."[3] Even after fit testing was offered, at no time were contractors in compliance with OSHA's respiratory protection standard. For months into the disaster workers were allowed to wear respirators if they had beards.

The situation was complicated by several factors. First, lines of authority were complex and unclear. According to Bruce Lippy, "Participants at the December 2001, National Institute of Occupational Safety and Health (NIOSH) conference on worker safety at the WTC noted the lack of a clear command structure at the World Trade

---

[1]National Institute of Environmental Health Science (NIEHS), (Worker Education and Training Program (WETP) Response to the World Trade Center (WTC) Disaster: Initial WETP Grantee Response and Preliminary Assessment of Training Needs.

[2]Ibid.

[3]Bruce E. Lippy, CIH, CSP, "Safety and Health of Heavy Equipment Operators at Ground Zero," American Journal of Industrial Medicine, (2002) 42:539-542

Center (site) thwarted efforts to enforce PPE (personnel protective equipment) and risk-reduction behaviors'.[4]

Since the Occupational Safety and Health Administration (OSHA) saw its role during this period as that of a consultant to the Federal Emergency Management Agency (FEMA), rather than as an enforcement Agency, contractors did not have an incentive to require workers to comply with OSHA's protective standards. The consequence was that wearing a respirator was voluntary and contractors took little, if any, responsibility for ensuring that workers wore appropriate personal protective equipment.

Second, contractors created working conditions which guaranteed that workers would suffer workplace injuries and illnesses. It is difficult for any worker to wear a respirator for a full 8 hour shift while doing heavy labor, let alone to work for 12 consecutive hours as did the workers at the World Trade Center site. Contractors should have developed a programs which included administrative controls, limiting work to a reasonable period of time, giving workers time to rest and recover. Moran and Elisburg noted that by the end of three and a half weeks "The intensity of effort, long hours, continual work seven days a week has resulted in severe stress and fatigue, and a high rate of injury and illness among those workers."[5] Work continued at this pace for over 9 months with the consequence that thousands of workers have been diagnosed with mental illness from the stress experienced working at the World Trade Center site. Also, contractors did not take into account that OSHA standards were written based on 8-hour exposures. Levels of exposure to which a worker may be exposed over 8 hours which are deemed acceptable, may not be the same as those appropriate for a 12-hour shift.

Third, the contractors did not issue a site safety and health plan until 48 days after September 11th. By failing to develop safety, detailing lines of authority and the responsibilities of each party while work was proceeding, the contractors sent a message about the low priority they gave to safety on the job.

IMMIGRANT WORKERS

While construction workers, firefighters, police, volunteers and others were performing the rescue and recovery operations at Ground Zero, day laborers were hired by private contractors to shovel the thick dust and debris from the buildings near the World Trade Center site. Their job was to make the inhabitable offices and residences in lower Manhattan livable. An estimated 1,800 to 2,000 day laborers worked immediately following the disaster and for many months thereafter. These are primarily immigrant workers from Latin America, Poland and parts of Africa. Most of them do not speak fluent English.

For the most part, contractors and their sub-contractors provided these workers with no personal protection, special equipment or safety training. Indeed, at the outset, many of the contractors were not paying workers and it was only after the intervention of the New York State Attorney General who intervened to force contractors to live up to their contractual obligations.

Because of the contractors failure to provide training and protective equipment, ,any of the workers have developed health problems as a result of their work at the World Trade Center site. In January of 2002, the Center for the Biology of Natural Systems, New York Committee for Occupational Safety and Health and the Latin American Workers Project provided medical screening to 410 workers engaged in the cleanup of Lower Manhattan. Of the workers who participated in the medical screening, nearly 100 percent had developed respiratory illness requiring medical attention as a result of dust exposure.

RESPONSES BY JOEL SHUFRO TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. Do you think S. 1761 sends workers a signal that their health may be sacrificed without recourse against a negligent contractor? If so, do you think it creates a disincentive for the best workers to join in cleanup efforts?

Also, could such a negative signal actually undermine cleanup efforts rather than aid those efforts as contracting companies suggest?

Response. The legislation, if enacted, sends a clear message to workers and volunteers: if you respond to a disaster situation, you are doing so at your own risk. Worse, it allows contractors to operate outside the legal framework which protects workers and residents from negligent behavior of a contractor which adversely af-

[4]Ibid
[5]Op.cit.

fects the health, safety and property of workers, volunteers and community residents.

Workers responded to the catastrophe on 9/11/2001 out of many different motivations: some did so out patriotism, others out of humanitarianism, some out of altruism and others for economic reasons. No matter what the reason that impelled workers to respond during a time of emergency, they expected that they, and their families, would be taken care if they are injured or made ill as a result of a negligent contractor. Although it is hard to predict an individual's behavior in the future, I think that the knowledge that participating in a rescue or recovery operation would may not only endanger your own health, but threaten the well-being of your families, would provide a disincentive for participation.

Given the levels of unemployment among the immigrants, there will always be a labor pool who will work-even under the most dangerous of conditions. At the World Trade Center and in the Gulf Coast, contractors have taken advantage of the vulnerability of workers, particularly immigrants, to avoid Government safety and health and environmental regulations. In both situations, the consequence has been that thousands of workers have contracted occupational illnesses and have suffered significant loss of income, family life and their own health.

During the hearing on this legislation, contractors explicitly stated and implicitly implied that if they were not able to escape liability for their actions, they would be reluctant in the future to respond in emergency situations. What this legislation does is to shift the costs from the contractors to workers and holds them harmless for violations of the country's environmental and labor laws.

This form of cost shifting is unacceptable and unproductive.

STATEMENT OF CRAIG S. KING, GOVERNMENT CONTRACTS ATTORNEY

Mr. Chairman, I appreciate the invitation to provide testimony regarding the impact of certain Government contractor liability provisions—in particular, Senate bill 1761 (hereinafter "S. 1761" or the "bill")—on environmental laws.

There is an important Federal interest in having the best, most responsible private contractors respond promptly and without reservation in the event of a disaster. In recent disasters, many private contractors have responded selflessly, even heroically, to provide the immediate response necessary to preserve life and property and, in subsequent months, to help remediate and restore normalcy to devastated communities.

However, disaster recovery efforts—even when performed responsibly by these companies and in accordance with contracts awarded by Federal, State and local Government authorities—expose private contractors to potentially costly litigation and even liability. The risks of litigation and potential liability that arise from contractors' responsible, good faith performance in response to disasters threaten to undermine future responses. The best, most responsible companies must think twice before becoming involved in future disaster recovery efforts, and may opt to stay away altogether. Equally important, the price tag for disaster recovery efforts necessarily includes compensation to contractors for the risks associated with the work—which means significant increases in the Government's costs to the extent contractors face lawsuits and potential liability for doing the work directed by the Government.

Thus, the Federal Government ("Government") has a strong interest in establishing appropriate standards for liability of Government contractors for actions taken under the exigencies of a disaster response. Of course, any limitations on contractor liability must be narrowly tailored to the needs of the disaster response, and must complement, not undercut, the enforcement of environmental laws, labor laws, safety laws and similar laws that promote additional Federal interests. Also, any limitations on contractor liability must not absolve private contractors from liability if they behave recklessly or commit willful bad acts. Contractors must remain accountable for improper conduct, as well as for proper performance of their contract obligations. Even in the exigencies of a disaster response, there can be no excuse for recklessness or willful misconduct.

The bill provides a reasonable approach to achieving the foregoing objectives. Key provisions of S. 1761 that bear on Government contractor liability are discussed below.

A. THE GOVERNMENT CONTRACTOR DEFENSE

Section 5(d) of S. 1761 provides that, if certain requirements are fulfilled, a contractor can avail itself of the Government contractor defense in the event of third-party litigation arising out of disaster recovery efforts. As discussed more fully

below, the essence of the Government contractor defense is that a contractor stands in the same legal position as the Government, and thus bears no liability to third parties, if it does what the Government tells it to do in the contract (provided, of course, that certain requirements are fulfilled).

The Government contractor defense is well established in the Federal common law. The principles underlying the defense reach back as far as 1940, when the U.S. Supreme Court determined that a contractor that performed a Federal contract to build dikes to improve navigation of the Missouri river was not subject to liability in a suit by a landowner for erosion caused by the work. Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). In Yearsley, the Court found that where there is a valid Federal contract, "there is no liability on the part of the contractor for executing [the Government's] will."

In 1988, the U.S. Supreme Court set forth more fully the parameters of, and rationale for, the Government contractor defense. In Boyle v. United Technologies Corporation, 487 U.S. 500 (1988), the Court found that a Federal interest exists in Government procurement contracts—stating:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts; either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

Boyle, at 507.

The Court explained that the Government contractor defense is rooted in the Government's sovereign immunity. The Court observed that when Congress waived the Government's sovereign immunity in the Federal Tort Claims Act to enable suits against the Government arising out of acts of Government employees, Congress exempted from this consent to suit any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the Government, whether or not the discretion involved be abused." Boyle, at 511. The Boyle Court concluded that contractors should be subject to the same limits on liability as the Government officials who direct the contractor's actions. The Court stated: "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."

The Court reasoned as follows: the selection of the appropriate design for military equipment is a discretionary function which should not be second-guessed in tort litigation; the financial burden of tort judgments against contractors will predictably raise their prices to cover, or insure against, such contingent liabilities; and state law which holds Government contractors liable for design defects does in some circumstances present a "significant conflict" with Federal interests and must be displaced. The Boyle Court embraced a standard that liability for design defects in military equipment cannot be imposed, pursuant to state law, when (i) the Government approved reasonably precise specifications; (ii) the equipment conformed to those specifications; and (iii) the contractor warned the Government about the dangers in use of the equipment that were known to the contractor but not to the Government.

1. The Government Contractor Defense Applies to Contractors that Enter Government Contracts to Respond to Disasters

The Supreme Court's reasoning in Boyle and Yearsley applies equally today in the case of contractors that enter Government contracts to respond to disasters:

- There is a Federal interest in having the best, most responsible private contractors respond promptly and without reservation in the event of a disaster.
- Determinations as to the work that should be done to respond to a disaster are a discretionary function of cognizant Government officials—and should not be second-guessed in tort litigation under State law.
- The financial burden of tort judgments against contractors will predictably raise the prices to cover, or insure against, such contingent liabilities—or may lead the best, most responsible contractors to decline to participate in disaster recover efforts.
- Here, as in Boyle, it makes little sense to insulate the Government against financial liability for the judgment as to work to be performed in response to a disaster if the Government performs the work itself, but not when it contracts for performance of the work.

It follows that state tort laws that would make Government contractors liable for work performed in response to a disaster present a "significant conflict" with Federal interests and must be displaced. Applying the standards announced in Boyle,

it is already clear that liability for work done under Government contracts to respond to disasters cannot be imposed, pursuant to state law, when: (i) the Government approved a reasonably precise scope of work; (ii) the work performed was in accordance with the scope of work; and (iii) the contractor warned the Government about any dangers in performing the work that were known to the contractor but not to the Government.

As set forth below, the effect of the bill is to avoid costly litigation about the applicability of the Boyle standards in the case of contracts undertaken pursuant to the exigencies of disaster recovery.

2. The Effect and Limited Scope of the Applicability of the Government Contractor Defense Under S. 1761

S. 1761 affirms that the Government contractor defense is applicable to certain contracts entered for the purpose of disaster recovery, and provides certainty and uniformity of approach to the application of the defense by providing, among other things, a process by which a cognizant Government official reviews the scope of work of a contract and certifies that the contract is necessary to the disaster recovery effort. More specifically, the Bill provides that the elements of the Government contractor defense shall be deemed satisfied without further proof in Court if the following conditions are satisfied:

i. A competent Government authority (i.e., the Corps of Engineers) certifies in accordance with the Bill that it has reviewed the scope of work set forth in the contract and the work is necessary for the recovery of the disaster zone[1] from a disaster. In order to so certify, the Government authority must determine that a majority of the scope of work set forth in the contract is for one or more of the following five activities:

a. The search, rescue, or recovery of individuals or property dislocated by the disaster;

b. The demolition, removal, repair, or reconstruction of structures or utilities damaged by the disaster;

c. The clean-up or remediation of property polluted by the disaster;

d. The removal of debris deposited by the disaster (including dredging); or

e. The de-watering of property flooded by the disaster.

ii. The contractor did not act fraudulently or with willful misconduct in submitting information to the Government to obtain the certification (Section 5(d)(3)), and did not act with recklessness or willful misconduct in performing the work (Section 5(e)(3)).

The bill is subject to appropriately narrow limitations as to geographic scope (i.e., the bill applies only to Government contracts necessary for the recovery from Hurricane Katrina or a similarly declared disaster that requires at least $15 billion in Federal assistance—and does not apply to any other situation). In addition, the Bill applies only to contracts involving the five specified types of contracts.

S. 1761's provision for deeming the elements of the Government contractor defense to have been satisfied is important to reduce risks and costs, and to provide for uniformity of application of the defense. In cases in which the Government contractor defense has been invoked, there often has been protracted litigation over the application of the Boyle standards. After considerable legal wrangling, it has by now become reasonably well settled that, for example, Boyle applies in non-military as well as the military contexts and applies to virtually all types of Government contracts, and Government decisions with respect to remediation efforts (e.g., EPA decisions regarding clean-up of contaminated sites) are "discretionary functions". Nonetheless, there has been considerable litigation to reach these conclusions, and legal wrangling continues in particular cases to meet plaintiff's challenges, for example, as to whether the Government's work specifications in that particular case are sufficiently specific to support the Government contractor defense.

The bill's process for the Government to provide a certification that the scope of work of a contract fulfills one of the five purposes of disaster recovery is a reasonable approach that will provide certainty in the application of the Government contracts defense to contracts for disaster recovery. The "discretionary function" requirement of Boyle is fulfilled by the certification. A cognizant Government official will have reviewed the scope of work and determined that the work is necessary for the recovery of the disaster zone from a disaster. The limitation to a specified geographic region and to the five specified types of activities keeps the application of

[1]A disaster zone is any region of the United States in which major disasters relating to Hurricane Katrina were declared by the President on August 29, 2005 under the Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), or were so declared thereafter if the disaster requires Federal assistance in an amount that exceeds $15 billion.

the Bill appropriately narrow. The exigencies of a disaster response warrant providing the assurance that, for contracts within the five specified disaster response activities, the Government's exercise of discretion as to the work that will be performed will not be second-guessed in a tort litigation.

Certainty and uniformity of approach are enhanced in a reasonable manner by S. 1761's provisions for: (i) a Federal cause of action for claims arising out of performance of a contract that is certified by a Government official; and (ii) original and exclusive Federal jurisdiction over lawsuits for loss of property, personal injury, or death arising out of the performance of such a contract. Consistent with U.S. Supreme Court's findings in Boyle and Yearsley, S. 1761 amounts to a Congressional declaration that: there is Federal interest in having the best, most responsible private contractors respond promptly and without reservation in the event of a disaster; a certification by a cognizant Government official under the Act that certain work is necessary for the recovery of the disaster zone is "discretionary" and should not be second-guessed under State tort laws; and therefore state tort laws must be displaced absent evidence of contractor fraud, recklessness or willful misconduct. As the Court stated in Boyle, these are matters of Federal common law that involve Federal preemption to displace state tort laws. It is appropriate that such be resolved in the Federal courts. Indeed, one would be hard pressed to think of issues more suited to be resolved in Federal, rather than State, court.

Of course, this does not complete the analysis. Under the Act, the Government contractor defense would apply only if the contractor did not act fraudulently or with willful misconduct in submitting information to the Government to obtain the certification, and did not act with recklessness or willful misconduct in performing the work. These seem to be reasonable parameters for proscribing wrongful conduct of contractors vis-&-vis third parties—especially in view of the exigencies associated with a disaster response. The ultimate effect is that contractors are held accountable under the contract to perform the work set forth therein—but they are not liable to third parties for the Government's decisions as to what work should be done or for their non-reckless performance of that work. Absent recklessness of willful misconduct, third parties must look to the Government for any available relief—if not through tort litigation against the Government, then in some other manner. But where a private suit against the Government is barred by sovereign immunity (i.e., is not available under the Federal Tort Claims Act), there is no alternate route under the law to sue a contractor that performed the job the Government asked it to do.

Private litigants simply cannot recover indirectly from contractors that which Federal law bars them from recovering directly from the Government. This is the essence of the U.S. Supreme Court's holdings relative to the Government contractor defense. The bill recognizes what is embodied in Federal common law, and provides assurances of certainty and uniformity of approach in the application of the Government contractor defense for contracts entered to respond to disasters.

What S. 1761 means as a practical matter is that, for contracts certified as necessary for disaster relief, there will be no litigation as to the application of the Boyle standards. The first Boyle standard (i.e., Government approval of a reasonably precise scope for the work) is satisfied by the certification process, and thus is appropriately deemed fulfilled under the bill. The second Boyle standard (i.e., the work was performed in accordance with the scope of work), is deemed fulfilled subject to a showing that the contractor was reckless or committed willful misconduct. The Bill does not provide protection for contractor conduct that is not covered by the second Boyle standard—i.e., activities that are outside of the scope of work.

Finally, the deeming of the third Boyle standard (the contractor's obligation to warn the Government of dangers about which the contractor is aware but not the Government) means that contractors may proceed with disaster recovery work directed by the Government even though many risks are unknown and unknowable. The bill eliminates costly litigation over what the contractor knew or did not know in undertaking work in a disaster relief situation. It is inherent in the nature of disaster relief work that many risks are unknown and unknowable. Government officials and contractors make good faith efforts to act in a prudent manner, but cannot fully assess the risks. By deeming the Boyle elements to have been satisfied, a contractor can proceed immediately with disaster recovery work as directed by the Government without the type of risk assessments that may be expected in normal construction and remediation efforts but that cannot reasonably be done in a disaster relief situation.

3. Potential Amendments to S. 1761

As discussed below, the subcommittee may wish to consider an alteration to the provisions of S. 1761 that designate the Army Corps of Engineers ("Chief of Engi-

neers") as exclusively responsible for the review and certification of Government contracts under the Bill.

Government contracts certified under the Bill might be awarded by the Army, FEMA or other Federal agencies. In addition, state and local Governments may enter contracts for work in the five areas identified in the Act, and then request that FEMA reimburse them with Federal funds. As I understand it, if FEMA were to deny reimbursement for a contract awarded by a state or local Government, the Bill nonetheless would apply and such a State or local contract could qualify for certification.

S. 1761 contemplates that, in order for the certification provisions to apply, the Chief of Engineers will review the scope of work and provide the requisite certification for all disaster recovery contracts—whether issued by a Federal Agency or a state or local Government. This imposes a burden on the Chief of Engineers that may be undue and unnecessary. It also divorces the certification process from the contract award process (and from the decision whether to provide Federal funds to reimburse a state or local Government contracts)—and this has been shown in another context not to be a particularly effective approach.

The certification process described in S. 1761 is similar to the process for certifying antiterrorism technologies under the SAFETY Act. In the SAFETY Act, Congress invited companies to apply to have their technologies certified by the Government as desirable for use against terrorism. In the event of lawsuits arising out of the use of a certified technology, the Government contractor defense applies and, as under the Bill at issue here, the elements of the Government contractor defense are deemed to have been satisfied through the certification. The Department of Homeland Defense was given exclusive responsibility for certifying antiterrorism technologies under the SAFETY Act. The certification process was divorced from the procurement process. The result has been that few certifications have been granted, and the certification process has not been very effective in meeting the needs of the companies or Government procurement officials.

The subcommittee may, instead, want to consider having the certifications done by: (i) in the instance of a contract awarded by a Federal Agency, the Government contracting officer who awards the Federal contract; and (ii) in the instance of a contract awarded by a state or local Government, by the Federal official who determines whether to reimburse the contract with Federal funds. As to the first of these, the Government contracting officer would be well suited to review the scope of work and make the appropriate determinations, and could do so as part of the contract award process. Nobody is in a materially better position to make the type of determinations required by the Act—and having the contracting officer provide the certification likely would result in little or no delay due to the need for a certification. As to the second point, the Federal official who reviews the scope of work for reimbursement would be well positioned to make the certification. For State and local contracts that are not submitted for Federal reimbursement, an alternate mechanism for providing the certification may need to be developed—or the committee might choose to exclude such contracts from the coverage of the Act.

B. WHAT THE BILL DOES NOT DO

As a conclusion, it may be appropriate to emphasize what the bill does not do. The bill does not abrogate the applicability of any other laws or regulations. All environmental laws would continue to apply. Federal State and local Government enforcement officials would continue to be able to take whatever steps they deem necessary to enforce full compliance with the environmental laws, and to punish noncompliance. As I understand it, the bill would limit certain private rights of action, but would do nothing to impair the ability of cognizant Federal, State and local officials to fully enforce these laws.

Similarly, all Federal, State and local labor and employment laws would continue to apply. The rights of cognizant Government officials, individual applicants and employees to enforce these laws in court are unaffected by the bill.

The same holds true for health and safety laws. The enforcement authorities of the U.S. Occupational Safety and Health Administration are not affected by the bill.

Perhaps most important, as discussed above, the bill does not limit the liability of Government contractors for recklessness or willful misconduct, nor does it limit the ability of the Government to require proper performance of contract obligations. The bill does not allow contractors to escape liability for bad acts.

C. CONCLUSION

The thrust of S. 1761 is merely to put contractors that perform Government contracts on the same legal footing as the Government personnel who award them

those contracts. It provides for cognizant Government personnel to review the scope of work for such contracts, and determine that the work is necessary to the disaster recovery effort. With such deliberation and exercise of discretion on the Government's part, it is fair and reasonable for Contractors to proceed with the work promptly and without fear of legal liability so long as they are not reckless and commit wrongful misconduct. In view of the exigencies of disaster response, and the Federal interest in having the best, most responsible contractors available for recovery efforts, the bill seems a measured and appropriate approach.

Thank you.

RESPONSE BY CRAIG KING TO AN ADDITIONAL QUESTION FROM SENATOR THUNE

Question 1. Because Section 4 of S. 1761 waives an individual right of action for contractors who carry out a Government disaster contract, can you explain whether or not this provision waives a contractors obligation to follow existing Federal environmental laws?

Response. The waiver of an individual right of action that is contained in S. 1761 would not diminish contractors' obligations to follow existing Federal environmental laws. All Federal environmental laws would continue to apply. Federal, State and local enforcement officials would continue to enforce compliance with those laws. There is nothing in S. 1761 that would abrogate the applicability of any other laws or regulations, or impair the enforcement of the environmental laws by Government officials.

RESPONSE BY CRAIG KING TO AN ADDITIONAL QUESTION FROM SENATOR BOXER

Question 1. Mr. King, if a contractor is negligent in its performance of a contract and injures or kills an innocent citizen in a declared disaster as described in S. 1761, will the contractor receive liability protection and the victim lose their claim unless the victim can show that a Government contractor acted fraudulently or with willful misconduct in merely submitting information to the Chief of Engineers for the Army Corps? More specifically, this information is the material that the Chief of Engineers uses to determine whether the work is necessary for the recovery of a disaster zone from a disaster, including a review of the scope of work that the Government contract does or will require and that the work includes cleanup, debris removal, reconstruction, de-watering and other such tasks.

Response. The thrust of S. 1761 is that a contractor who is doing what the Government directed it to do will not be second-guessed in tort litigation unless it can be shown that the contractor acted with "recklessness or willful misconduct." The liability protection derives from the Government contractor defense—which is well recognized in the common law and provides that a contractor stands in the same legal position as the Government, and thus bears no liability to third parties, if it does what the Government tells it to do in a contract. Sovereign immunity shields Government officials from third-party suits when these officials make the type of discretionary decisions that are necessary in disaster relief efforts. The courts have made clear that in instances where the decisions of Government officials are insulated from liability, it makes little sense to not similarly insulate contractors who implement such Government decisions.

It would not be appropriate for this protection to apply to contractors who fail to implement dutifully the Government decisions and instead commit wrongful acts that cause injury. Thus, S. 1761 specifically provides that a contractor would be subject to full liability to third parties arising from the contractor's reckless acts or willful misconduct. More specifically, S. 1761 provides that the liability protections shall not affect "the liability of any person or entity for recklessness or willful misconduct."

The question suggests that the Senator may believe that, in holding contractors accountable for any wrongful acts, it is more appropriate to use a standard of "negligence" rather than "recklessness or willful misconduct." This is certainly a debatable proposition. Under a negligence standard, any person adversely affected in a disaster could sue so long as they could come up with a plausible theory as to why the Government's decision, or the contractor's implementation of it, was not "reasonable". This seems too loose a standard for application in the exigencies of a disaster response. Disaster situations often require prompt, decisive action by the Government and its contractors with little time for the type of engineering, planning and risk assessments that would be normal in other circumstances. Under a negligence standard, a contractor could perform precisely and dutifully in accordance with the Government's direction and still face suits for "negligence" based on third-party ar-

guments that the Government's decisions were not reasonable. Under the exigent circumstances of disaster recovery, such after-the-fact second-guessing of the actions of the Government and its contractors, absent evidence of recklessness or willful wrongdoing, seems highly likely to be unfair—and to create unwise legal impediments to contractors pitching in when needed in future disaster recovery situations. By not using a "negligence" standard, S. 1761 provides a measure of deference in disaster recovery situations to Government decision makers and the contractors who implement the Government's decisions. That deference seems warranted under the exigencies of disaster recovery efforts.

That does not end the issue. It may well be appropriate to provide compensation to those who suffer injuries in disaster recovery situations even if the contractor was not reckless or willful. It does not necessarily follow, however, that contractors must be, in effect, the default source of such compensation. During the hearing, the panel participants discussed several potential approaches for providing compensation to parties injured in disaster recovery situations through no recklessness or willfulness of a contractor. Congress should seriously consider enacting one or more of these approaches, or some other appropriate measure, to ensure that individuals injured in disaster recovery situations receive due compensation.

Finally, the question refers to the provision in S. 1761 that allows for defeating the presumption that the elements of the Government contractor defense have been satisfied. The presumption can be defeated based upon a "showing that a person or entity awarded a Government contract acted fraudulently or with willful misconduct in submitting information" to the Chief of the Corps of Engineers. The reference in the question seems to be based on an incomplete understanding of S. 1761. Certainly, the presumption that the Government contractor defense applies can be defeated by showing fraud or willful misconduct in submitting the information to the Government. However, the more relevant provision for purposes of the question is the very last clause of S. 1761, which was discussed above. That provision makes the liability protections completely inapplicable—and thus enables suits by injured parties—where a contractor acts recklessly or with willful misconduct in performing disaster recovery activities.

RESPONSE BY CRAIG KING TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. Mr. King, in your testimony, on page 3, you discuss the Government contractor liability defense and relevant case law on this defense. You have interpreted this case law to provide that private litigants cannot recover indirectly from contractors when they are barred under Federal law from recovering directly from the Government. How does the bill's bar against private parties filing claims against contractors for Federal environmental laws affect a citizen's ability to sue a negligent contractor whose negligence results in harm to human health and the environment?

Response. The bar in S. 1761 against private parties filing claims for violations of the Federal environmental laws does not bar private party claims that do not arise under the Federal environmental laws. While enforcement of the environmental laws is reserved for Government enforcement authorities, a party injured by a contractor's actions in a disaster recovery effort could bring suit against the contractor on other appropriate grounds. As discussed above, there is room for honest debate as to those other appropriate grounds—i.e., whether the appropriate legal standard for such suits by injured parties is "negligence" or "recklessness or willful misconduct." S. 1761 embraces the notion that under the exigencies of a disaster recovery there should be a measure of deference to Government decision makers and contractors who implement the Government's decisions—and that therefore it is appropriate that a contractor doing the Government's bidding be immune from suits unless the contractor is reckless or commits willful misconduct.

STATEMENT OF STEVEN L. SCHOONER, CO-DIRECTOR, GOVERNMENT PROCUREMENT LAW PROGRAM, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Chairman Thune, Ranking Member Boxer, and members of the committee, I appreciate the opportunity to appear before you today to discuss the impact of certain Government contractor liability proposals on environmental laws. My discussion of S. 1761, the Gulf Coast Recovery Act, and its treatment of Government contractor liability, derives from my experience in Federal procurement policy, practice, and law. This committee's focus upon, and interest in improving, the procurement process is an important and valuable public service.

From a public procurement perspective, this legislation is entirely unnecessary. The bill would expose the public, specifically individuals, to unnecessary risk and harm. Moreover, the bill would discourage responsible contractor behavior and, instead, encourage behavior that is harmful to the public. Further, this bill reflects a disconcerting trend of seemingly opportunistic post-crisis behavior. Specifically, the bill seeks to capitalize upon hurricane Katrina's devastation to obtain, for the contractor community, long-sought after, and long-denied, insulation from liability. This type of opportunistic behavior is not only ill-conceived, but it is harmful to the credibility of the Federal Government's procurement process.

THIS LEGISLATION IS ENTIRELY UNNECESSARY

The bill's findings assert that "well-founded fears of future litigation and liability under existing law discourage contractors from assisting in times of disaster." Experience suggests that this assertion, the premise underlying S. 1761, is, at best, hyperbole and, at worst, simply false. I have seen nothing that suggests that a significant number of the nation's (or the world's) best contractors have been discouraged from seeking the United States Government's business.

This tactic is not new. Throughout my career (in the private sector, in the Government, and in academia), I have heard apocalyptic tales of monumental barriers to entry, erected by the Government, that frighten firms away from seeking, or continuing to seek, the Government's business. (As a procurement policy official, I most often confront these assertions in the context of efforts to eliminate the qui tam provisions in the False Claims Act.)[1] What I have not seen—and what is again absent here—is empirical data or concrete information supporting the assertion. This absence of support is palpable.[2]

> Q: Has any AIA member company declined to bid for or accept the award of a Government contract because that company could not be indemnified by the Government for catastrophic risk?
>
> A: The consequences of unusually hazardous or nuclear risks arising under Government contract, generally, do influence the business decision process.

Letter from Lloyd R. Kuhn to the Honorable Charles E. Grassley, June 28, 1985, S. Hrg. 99-321, Hearing before the committee on the Judiciary on S. 1254, U.S. Senate, 99th Congress, 1st Session (Serial No. J-99-32, June 11, 1985) at 96-97.

Every day, the best contractors, small and large, domestic and foreign, aggressively vie for a share of the Government's $300 billion procurement budget. At one end of the spectrum, firms compete for the lion's share of the Government's contracts, which might be described as garden-variety or commercially available work, providing, for example, office supplies, custodial services, construction, or information technology support. At the other end of the spectrum, a far smaller population of firms compete to design and build unique systems involving the most advanced, cutting edge technology imaginable. In a fraction of contracts found in the latter group, where the work can be extraordinarily complex and dangerous, unique rules have evolved to insulate contractors from certain liabilities. But a stark, deep chasm distinguishes these extraordinary contractual actions from the ordinary. S. 1761 does not appear to cover extraordinary work; rather the bill specifically describes seemingly ordinary tasks such as debris removal, logistics, reconstruction, and basic public services. Accordingly, extraordinary measures are neither necessary nor appropriate.

ALTERING THE EXISTING RISK ALLOCATION REGIME SENDS THE WRONG MESSAGE

S. 1761 intends to insulate certain contractors from liability, even when the contractor is at fault. If that is the case, the bill's mechanism is flawed, particularly in its allocation of risk of harm between the public, contractors, and the Government.[3] As a matter of policy, we should prefer a solution that allocates risk to the

---

[1]U.S.C. §3730.

[2]Here, history is instructive. At similar hearings 20 years ago, Senator Grassley asked the Aerospace Industries Association [AIA] whether any members of its association "no longer bid on Government contracts because of the fear of liability suits?" AIA asserted that it lacked sufficient information to respond at the hearing and, in a subsequent written response, was no more convincing. Even responding "on a non-attribution basis[,]" AIA failed to identify a single firm.

[3]Generally, the Government expects contractors to purchase insurance and, accordingly, the Government willingly pays contractors to obtain that insurance. Prospective indemnification is employed only in extraordinary circumstances (for example, in the nuclear industry) where contractors either cannot obtain insurance for a certain risk or the cost of insurance would be prohibitive. See, e.g., 48 C.F.R. §50.403 (indemnification for unusually hazardous or nuclear risks); Public Law No. 85-804. Thus, indemnification—through which the Government, in effect, self-

Continued

superior risk bearer. Here, it seems reasonable to conclude that the superior risk bearer is the party best positioned to, among other things, (1) appraise, in advance, the likelihood that harm will occur; (2) avoid the occurrence of the risk; (3) insure against the risk; or (4) bear the cost of the risk. This bill appears to do the exact opposite. S. 1761 allocates the risk of loss to the individual, the party with the least opportunity to anticipate, assess, or avoid the risk, insure against it, or bear its costs. Ultimately, however, what is particularly troubling is that the bill dilutes contractors' incentives to assume responsibility for their work and adopt prudent risk avoidance strategies.[4]

> . . .Indemnification creates a difficult balance. In the commercial world, risks of third party liability are covered by insurance or are assumed by the manufacturer. . . We are concerned that blanket indemnification may reduce the contractors' incentive to assume responsibility for the performance of their products. . . We prefer to contract in an environment similar to the commercial marketplace where companies must take all the steps that would be required of a prudent businessman in order to ensure the safety of the company's product.

Statement of Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management, S. Hrg. 99-321, Hearing before the committee on the Judiciary on S. 1254, U.S. Senate, 99th Congress, 1st Session (Serial No. J-99-32, June 11, 1985) at 30.

Again, under S. 1761, the Government neither will take responsibility for its contractors' actions, nor will the Government permit the public to hold those contractors accountable. The bill appears to determine, in advance, that neither the Government nor its contractors would be held responsible if contractors injured (or killed) people or damaged (or destroyed) personal or commercial property.[5]

> The immediate effect of the [Government contractor] defense is to place the full cost of mishaps on injured parties who, but for Government involvement, would be able to shift that cost to the contractors. Conversely, assimilating contractor liability to normal tort rules might advance traditional objectives of compensating injured parties, spreading losses, or implementing generalized notions of fairness.

Ronald A. Cass & Clayton P. Gillette, The Government Contractor Defense: Contractual Allocation of Public Risk, 77 VA. L. REV. 257, 260 (1991) (emphasis added, footnotes omitted).

Protection of the public from harm—rather than protection of the economic interests of contractors—must come first.[6] In contrast, this legislation appears to mandate that: (1) the party at greatest risk should be the individual, a member of the public, who is harmed; (2) neither the Government nor the Government's contractors should bear responsibility for harm inflicted upon the public; and (3) this outcome should prevail even if the insurance market could better allocate, in advance, the risk of harm. Again, these issue of contractor liability is not new.[7] But the solution—that the public should bear the risk of loss, rather than the Government or its contractors—is as novel as it is unappealing.

---

insures rather than reimbursing the contractor for its insurance costs—derives from a failure of the marketplace, specifically the insurance industry. See, generally, Ralph C. Nash & John Cibinic, Risk of Catastrophic Loss: How to Cope, 7 NASH & CIBINIC REP. ¶ 44 (July 1988). But bear in mind that the indemnification debate focuses upon prospective allocation of risk between the Government and its contractors—it does not suggest that members of the public, if injured, should have no remedy.

[4]As the Defense Department explained twenty years ago:

[5]This seems troubling from a behavioral standpoint.

[6]Consider the 1963 report on catastrophic accidents in Government programs prepared by the Legislative Drafting Research Fund of Columbia University on behalf of the National Security Industrial Association. Albert J. Rosenthal, Harold L. Korn & Stanley B. Lubman, Catastrophic Accidents in Government Programs, 72-76 (1963). The report staked out the immensely reasonable conclusion that: "The most important objective—is the assurance of prompt and adequate compensation of the public." Id., Summary at 12.

[7]The Department of Justice (DOJ) objected to a 1985 bill to, among other things, reduce liability of contractors, because it did not "believe that Government indemnification of contractor losses is the appropriate way to solve the problems faced by Government contractors because of changing tort liability—" S. Hrg. 99-321, Hearing before the committee on the Judiciary on S. 1254, U.S. Senate, 99th Congress, 1st Session (Serial No. J-99-32, June 11, 1985). "In the past few years, the efforts of Government contractors to transfer their product liability exposure to the Government has increased dramatically." Id. at 22. Although DOJ acknowledged "that the changes in the tort system have created problems for contractors, [it] did not believe that indemnification is an appropriate response, and certainly it does not correct the underlying reasons for these problems."

MISUSE OF THE GOVERNMENT CONTRACTOR DEFENSE

Unfortunately, the bill attempts to apply, quite broadly, the "Government contractor defense" to disaster relief. In so doing, the bill turns the Government contractor defense on its head. S. 1761 would create a "rebuttable presumption that—all elements of the Government contractor defense are satisfied; and—the Government contractor defense applies in the lawsuit." This would be a dramatic (and inappropriate) application of the Government contractor defense.

The Government contractor defense, as it has been interpreted, seeks to insulate (historically, supply) contractors that explicitly follow Government direction to their detriment.[8] To the extent that contractors exercise significant amounts of discretion in the performance of their contracts, however, the defense has not protected them.[9] This point is particularly important. When the Government rushes to identify contractors, hastily drafts its contracts (or merely relies upon open-ended, vague statements of work), and loosely manages contract performance, the Government necessarily delegates the exercise of discretion to contractors in performing their contracts. Specifically, contractors must weigh, among other things, haste versus caution, or, to some extent, profits versus care.[10] It is troubling enough that the Government would cede such important decisions to contractors; but it seems strange that the Government, prospectively, would insulate its contractors from the fiscal ramifications of those decisions.

This scenario is dramatically different from, for example, the types of contracts intended to be covered by the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act).[11] The SAFETY Act sought to encourage the development, and protect the use of, new or evolving (and, implicitly, unproven) technologies. The underlying assumption of the SAFETY Act is that, without insulation from liability, contractors might not otherwise permit the Government to deploy these technologies, known as qualified anti-terrorism technologies (QATTS), to combat terrorism. In other words, the contracts involve unusual work or technologies (or unusual use of technologies) that is perceived as extraordinarily risky.[12]

Here, the statute would apply to far more common, if not mundane, tasks. Although clearly important, by and large, the contracts that this bill would cover involve routine tasks such as search and rescue; demolition and repair; debris removal; and de-watering of flooded property. In all such cases, the existing standard of care seems reasonable. Moreover, the rather mechanical certification responsibility assigned to the Chief of Engineers is a far cry from the highly judgmental and discretionary decision required of the Homeland Security Department Under Secretary pursuant to the SAFETY Act. Specifically, the SAFETY Act employs a number of criteria,[13] most, if not all, of which are absent here. For example, it is difficult

---

[8]See, e.g., Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[9]The Boyle decision seems to be providing the logical framework—to decide whether the Government contractor defense will protect contractors from tort liability—[T]he Supreme Court has given a set of straightforward requirements—the most important of which is the Government approval requirement.—[W]here the Government Agency is a full participant in the design process, the defense can be predicted to be a winner. In contrast, if the Government has not participated in design the contractor will find it very hard to use the defense. If the plaintiff can prove that the defect occurred in the manufacturing process, the defense will be of little or no value to the contractor. Ralph C. Nash & John Cibinic, Postscript: The Circuit Court View of the Government Contractor Defense, 8 NASH & CIBINIC REP. ¶ 52 (August 1990).

[10]In removing debris, for example, a contractor faces significant economic choices with regard to, among other things, (1) the experience of its personnel (e.g., drivers with spotless safety records might demand higher wages); (2) the quality and maintenance of its equipment (newer, better maintained trucks likely cost more to purchase or lease); (3) the means of performance (the minimally acceptable environmental standards likely cost less than more current, potentially cleaner and/or safer technologies); or (4) time management (truck drivers might save time and money by transporting hazardous waste through, rather than avoiding, residential communities).

[11]Pub. L. 107-296, § 861. See, generally, Homeland Security SAFETY Act page at https://www.safetyact.gov/DHS/SActHome.nsf/Main?OpenFrameset&6HYKFL;Alison M. Levin, Note: The SAFETY Act of 2003: Implications for the Government Contractor Defense, 34 PUB. CONT. L.J. 175 (2004).

[12]This point cannot be over-emphasized. For a good articulation of this principle, see, e.g., Patrick E. Tolan, Jr., Environmental Liability Under Public Law 85-804: Keeping the Ordinary Out of Extraordinary Contractual Relief, 32 PUB. CONT. L.J. 215 (2003) (emphasizing the unique (or, specifically, extraordinary) nature of the contractual requirements, particularly in research and development, that proved uninsurable because they involved, for example, nuclear power or highly volatile missile fuels).

[13]The seven criteria include: prior United States Government use or demonstrated substantial utility and effectiveness; availability of the technology for immediate deployment in public and

Continued

to create a scenario in which there would be a "substantial likelihood that the technology [involved in, e.g., debris removal] will not be deployed unless the [Gulf Coast Recovery Act] protections are extended."

OPPORTUNISTIC POST-CRISIS LEGISLATION HARMS THE PROCUREMENT PROCESS

As discussed above, this legislation may be good for contractors, but it does not appear to be in the best interests of the nation. Frankly, it is difficult to understand why Congress would rush to protect, prospectively, those contractors that, in performing post-Katrina construction work, unnecessarily fail to take precautions, inadequately supervise employees, or employ unduly risky processes or substandard materials or equipment that place the public's health, safety, and property at risk. Unfortunately, this bill seems to further the trend, since hurricane Katrina, to utilize the disaster to pursue public policies that otherwise might prove untenable.

For example, in its $51.8 billion post-Katrina emergency supplemental appropriation, Congress hastily raised the "micro-purchase threshold" (which, in effect, serves as the charge card purchase cap) to $250,000 for purchases relating to relief and recovery from Hurricane Katrina.[14] That's a 100 percent increase on the typical $2,500 limit and a completely different animal from the $15,000 limit previously imposed during contingencies and emergencies. Fortunately, the administration soon thereafter chose to bar further use of this authority.[15] That this authority became law is breathtaking.[16] At the time, more than 300,000 Government purchase cards were in circulation. A mountain of Inspector General reports, Government Accountability Office studies, and Congressional hearings have demonstrated that the Government's management of its charge cards has been abysmal. In August, the White House issued long overdue guidance mandating fundamental training and risk management policies.[17] Moreover, the effect upon small businesses would have been devastating.

The same can be said for the administration's suspension—and subsequent repeal of the suspension—of the Davis-Bacon Act.[18] The suspension of this law, which requires that workers on Federal construction contracts be paid prevailing wage rates, would have ensured that contractors could profit from the massive reconstruction effort without permitting minimum wage workers to receiving prevailing wages that might permit them to rise into the lower middle class. The administration's putative explanation—that without suspension of the Davis-Bacon Act, insufficient labor would be available—was simply disingenuous.

In both of these examples, the rush to change procurement policies subsequently was overcome by reason. Hopefully, reason will prevail here as well. Bear in mind that knowledgeable Federal procurement executives—both with regard to Iraq and post-Katrina relief understand that the current procurement regime contains sufficient flexibility for the Government to meet its purchasing requirements in times of crisis.[19]

---

private settings; existence of extraordinarily large or unquantifiable potential third party liability risk exposure to seller (or another provider of the technology); substantial likelihood that the technology will not be deployed unless SAFETY Act protections are extended; magnitude of risk exposure to the public if the technology is not deployed; evaluation of all scientific studies that can be feasibly conducted to assess the capability of the technology to substantially reduce risks of harm; and whether the technology would be effective in facilitating the defense against acts of terrorism. See, e.g., Homeland Security SAFETY Act page at https://www.safetyact.gov/DHS/SActHome.nsf/Main?OpenFrameset&6HYKFL.

[14]Public Law 109-62, § 101(2).

[15]Memorandum from Clay Johnson III, Deputy Director for Management, Limitation on Use of Special Micro-purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations (October 3, 2005).

[16]Steven L. Schooner, Fiscal Waste: Priceless, L.A. TIMES (September 14, 2005).

[17]Appendix B to Revised OMB Circular A-123, "Improving the Management of Government Charge Card Programs."

[18]Proclamation by the President: Revoking Proclamation 7924 (November 3, 2005), http://www.whitehouse.gov/news/releases/2005/11/20051103-9.html.

[19]"Iraq—taught us that many of the flexibilities contained in the Federal Acquisition Regulation—are poorly understood by many in Congress and the media—These flexibilities include limited as opposed to full and open competition, higher levels under which purchases can be made instantly, and more. Capitalizing on these flexibilities enables us to meet the demands for speed and agility integral to any recovery effort." Stan Soloway, Baghdad's Lessons for Orleans, GOV. EXEC. (Oct. 1, 2005), http://www.govexec.com/features/1005-01/1005-01advp2.htm. Last year, the Defense Department created the Joint Rapid Acquisition Cell (JRAC), because: "Some combatant commanders, as well as acquisition experts, don't realize that many legal requirements that tend to bog down military contracts don't apply during wartime—" See, e.g., http://www.defenselink.mil/news/Nov2004/n11242004—2004112405.html.

THIS LEGISLATION IGNORES THE GOVERNMENT'S MOST CRITICAL PROCUREMENT PROBLEM

I would be remiss if I failed to take this opportunity to address a pressing matter that cries out for Congressional attention and intervention.[20] The Federal Government must devote more resources to the acquisition function. This investment is urgent given the combination of the 1990's Congressionally-mandated acquisition workforce reductions, the administration's pressure to outsource,[21] and the dramatic increase in procurement spending since the September 11, 2001 attacks and, now, hurricane Katrina.[22]

Congress has been quick to call for more auditors and inspectors general to scrutinize Katrina-related contracting. That's a responsible gesture. But there has been no corresponding call for more contracting experts to perform the many functions that are necessary for the procurement system to work well. In order to serve the taxpaying public and meet the needs of Agency customers, acquisition professionals must promptly and accurately describe what the Government wants to buy, identify and select quality suppliers, ensure fair prices, structure contracts with proper monetary incentives for good performance, and manage and evaluate contractor performance.[23]

Sadly, the contracting workforce desperately requires a dramatic recapitalization.[24] A bipartisan, post-Cold War, 1990's initiative severely reduced the contracting workforce, leaving the Government unprepared for a post-9/11 spending binge. In the last four years, contracting dollars have increased by half, without a corresponding increase in the workforce. For fifteen years, the Government skimped on training, while contracting officers faced increasing workloads and confronted increasingly complex contractual challenges. Scarce resources, when they become available, were allocated to oversight, rather than supplementing, supporting, or training contracting people. Senior procurement officials increasingly bemoan that no young person in his or her right mind would enter Government contracting as a career.

The old adage—an ounce of prevention is worth a pound of cure—rings true. More auditors and inspectors general will guarantee a steady stream of scandals, but they'll neither help avoid the scandals nor improve the procurement system. Conversely, a prospective investment in upgrading the number, skills, and morale of Government purchasing officials would reap huge dividends for the taxpayers.

---

[20]See also, Steven Kelman & Steven L. Schooner, Scandal or Solution?, GOVEXEC.COM http://www.govexec.com/dailyfed/1105/110705ol.htm (November 7, 2005).

[21]Outsourcing, or its more palatable pseudonym, "competitive sourcing," has been one of five Government-wide initiatives in the Bush management agenda. See, e.g., Executive Office of the President, Office of Management and Budget, The President's Management Agenda, Fiscal Year 2002, www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf. "President Bush is a major advocate of—hiring private firms to do the Government's work—" Dru Stevenson, Privatization of Welfare Services: Delegation by Commercial Contract, 45 ARIZ. L. REV. 83 (2003), citing, David J. Kennedy, Due Process in a Privatized Welfare System, 64 BROOK. L. REV. 231, 232 (1998) (referencing "Governor Bush's effort to privatize most of Texas' welfare system—in his attempt to make a name for himself—that could carry him to national office." See also, Matthew Diller, Form and Substance in the Privatization of Property Programs, 49 UCLA L. REV. 1739, 1763, n. 94 (2002) ("Governor Bush sought to hand the administration of the state's welfare system over to—Lockheed Martin—and Electronic Data Systems—").

[22]See, generally, Steven L. Schooner, Feature Comment—Empty Promise for the Acquisition Workforce, 47 THE GOVERNMENT CONTRACTOR ¶ 203 (May 4, 2005), available at http://ssrn.com/abstract=719685; Griff Witte & Robert O'Harrow, Jr, Short-Staffed FEMA Farms Out Procurement, WASHINGTON POST D01 (September 17, 2005).

[23]A simple Iraq "lesson learned" was that, if the Government relies heavily upon contractors, the Government must maintain, invest in, and apply appropriate acquisition professional resources to select, direct, and manage those contractors. Unfortunately, insufficient contract management resources were applied. See, generally, Steven L. Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STANFORD LAW & POLICY REVIEW 549 (2005). For example, General Fay poignantly articulated: "[T]here was no credible exercise of appropriate oversight of contract performance at Abu Ghraib." MG George R. Fay, Investigating Officer, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, at 52 ("the Fay Report"). This problem exists Government-wide: "[T]he administration of contracts[,] once they have been signed[,] has been the neglected stepchild of [procurement system reform] effort." Steven Kelman, Strategic Contracting Management, in MARKET BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE at 89-90, 93 (John D. Donahue & Joseph S. Nye Jr. eds., 2002).

[24]See, generally, Federal Procurement: Spending and Workforce Trends, GAO-03-443 (April 2003); Steven L. Schooner, Fear of Oversight: The Fundamental Failure of Businesslike Government, 50 AM. U.L. REV. 627 (2001); Office of the Inspector General, Department of Defense, DoD Acquisition Workforce Reduction Trends and Impacts, Report D-2000-088 (February 29, 2000).

CONCLUSION

That concludes my statement. Thank you for the opportunity to share these thoughts with you. I would be pleased to answer any questions.

RESPONSE BY STEVEN L. SCHOONER TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. Please discuss how the Government contractor defense would work under S. 1761.

Response. Frankly, the Government contractor defense simply would not work—in terms of serving its original purpose—under S. 1761. My perception is that the process would entail the following:

1. A request would be submitted to the Corps of Engineers for a certificate. This request could be prospective or retrospective. It also appears that such a request could be submitted either by the Government, a contractor, or another entity such as an insurance company.

2. The Chief of Engineers would be required to issue a "certificate of need."

• if the work would take place in the disaster zone. (It is unclear whether the Chief of Engineers actually would need to determine whether the work "was or will be necessary for the recovery of a disaster zone from disaster. . . ."); and

• if at least 50 percent of the work fell into any of the identified (albeit broad) categories (including construction, clean-up, debris removal, etc.); and

• regardless of how much discretion the contractor enjoyed in performing the work; and

• regardless of whether the request applied to a Federal, State, or local Government contract.

3. Contractors (and subcontractors) could raise the Government contractor defense to defeat claims brought by a damaged party (e.g., a member of the public or a contractor employee). Specifically, they would be entitled to a rebuttable presumption that all of the elements of the Government contractor defense were satisfied and that the Government contractor defense applied to the lawsuit.

• "Moreover, a damaged party could not overcome the above presumption without producing evidence that the contractor acted fraudulently or with willful misconduct" in relation to the certificate process. Accordingly, this usage of the phrase "rebuttable presumption" seems inapt. Typically, one rebuts a presumption by producing evidence to the contrary. Here, however, even the production of specific, unequivocal evidence that demonstrated that it was inappropriate to apply the Government contractor defense would be to no avail.

4. Ultimately, then, the bill turns the Government contractor defense on its head. As I explained in my written statement:[1]

The Government contractor defense, as it has been interpreted, seeks to insulate (historically, supply) contractors that explicitly follow Government direction to their detriment.[2] To the extent that contractors exercise significant amounts of discretion in the performance of their contracts, however, the defense has not protected them.[3] This point is particularly important. When the Government rushes to identify contractors, hastily drafts its contracts (or merely relies upon open-ended, vague statements of work), and loosely manages contract performance, the Government necessarily delegates the exercise of discretion to contractors in performing their contracts. Specifically, contractors must weigh, among other things, haste versus caution, or, to some extent, profits versus care.[4] It is troubling enough that the Govern-

---

[1] In these excerpts, the numbering of the footnotes has changed from the original.

[2] See, e.g., Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[3] The Boyle decision seems to be providing the logical framework . . . to decide whether the Government contractor defense will protect contractors from tort liability—[T]he Supreme Court has given a set of straightforward requirements, the most important of which is the Government approval requirement. [W]here the Government Agency is a full participant in the design process, the defense can be predicted to be a winner. In contrast, if the Government has not participated in design the contractor will find it very hard to use the defense. If the plaintiff can prove that the defect occurred in the manufacturing process, the defense will be of little or no value to the contractor. Ralph C. Nash & John Cibinic, Postscript: The Circuit Court View of the Government Contractor Defense, 8 NASH & CIBINIC REP. 52 (August 1990).

[4] In removing debris, for example, a contractor faces significant economic choices with regard to, among other things, (1) the experience of its personnel (e.g., drivers with spotless safety records might demand higher wages); (2) the quality and maintenance of its equipment (newer, better maintained trucks likely cost more to purchase or lease); (3) the means of performance (the minimally acceptable environmental standards likely cost less than more current, poten-

ment would cede such important decisions to contractors; but it seems strange that the Government, prospectively, would insulate its contractors from the fiscal ramifications of those decisions.

REPONSES BY STEVEN L. SCHOONER TO AN ADDITIONAL QUESTIONS FROM SENATOR THUNE

Question 1. In your testimony, you expressed great dismay at what you call a "disconcerting trend of seemingly opportunistic post-crisis behavior." I am not sure what you mean by that, so let me ask what it is that you heard during our subcommittee hearing (from Mr. Zelenka, Mr. Perkins, or Mr. Feigin) that you would consider opportunistic? Are these gentlemen among the people you have in mind?

Response. My oral testimony was an effort to condense my prepared statement, which addressed this issue at great length under the heading: "Opportunistic Post-Crisis Legislation Harms the Procurement Process." Please consider the following excerpt:

> . . . Unfortunately, this bill seems to further the trend, since hurricane Katrina, to utilize the disaster to pursue public policies that otherwise might prove untenable.
>
> For example, in its $51.8 billion post-Katrina emergency supplemental appropriation, Congress hastily raised the "micro-purchase threshold" (which, in effect, serves as the charge card purchase cap) to $250,000 for purchases relating to relief and recovery from Hurricane Katrina.[5] That's a 100 fold increase on the typical $2,500 limit and a completely different animal from the $15,000 limit previously imposed during contingencies and emergencies. Fortunately, the administration soon thereafter chose to bar further use of this authority.[6] That this authority became law is breathtaking.[7] At the time, more than 300,000 Government purchase cards were in circulation. A mountain of Inspector General reports, Government Accountability Office studies, and Congressional hearings have demonstrated that the Government's management of its charge cards has been abysmal. In August, the White House issued long overdue guidance mandating fundamental training and risk management policies.[8] Moreover, the effect upon small businesses would have been devastating.
>
> The same can be said for the administration's suspension—and subsequent repeal of the suspension—of the Davis-Bacon Act.[9] The suspension of this law, which requires that workers on Federal construction contracts be paid prevailing wage rates, would have ensured that contractors could profit from the massive reconstruction effort without permitting minimum wage workers to receiving prevailing wages that might permit them to rise into the lower middle class. The administration's putative explanation-that without suspension of the Davis-Bacon Act, insufficient labor would be available—was simply disingenuous.
>
> In both of these examples, the rush to change procurement policies subsequently was overcome by reason. Hopefully, reason will prevail here as well. Bear in mind that knowledgeable Federal procurement executives—both with regard to Iraq and post-Katrina relief—understand that the current procurement regime contains sufficient flexibility for the Government to meet its purchasing requirements in times of crisis.[10]

---

tially cleaner and/or safer technologies); or (4) time management (truck drivers might save time and money by transporting hazardous waste through, rather than avoiding, residential communities).

[5] Public Law 109-62, §101(2).

[6] Memorandum from Clay Johnson III, Deputy Director for Management, Limitation on use of Special Micro-purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations (October 3, 2005).

[7] Steven L. Schooner, Fiscal Waste: Priceless, L.A. TIMES (September 14, 2005).

[8] Appendix B to Revised OMB Circular A-123, "Improving the Management of Government Charge Card Programs."

[9] Proclamation by the President: Revoking Proclamation 7924 (November 3, 2005), http://www.whitehouse.gov/news/releases/2005/11/20051103-9.html.

[10] "Iraq . . . taught us that many of the flexibilities contained in the Federal Acquisition Regulation . . . are poorly understood by many in Congress and the media. . . These flexibilities include limited as opposed to full and open competition, higher levels under which purchases can be made instantly, and more. Capitalizing on these flexibilities enables us to meet the demands for speed and agility integral to any recovery effort." Stan Soloway, Baghdad's Lessons for Orleans, GOV. EXEC. (Oct. 1, 2005), http://www.govexec.com/features/1005-01/1005-01advp2.htm. Last year, the Defense Department created the Joint Rapid Acquisition Cell

Continued

Following this section, my written statement attempted to contrast this opportunistic behavior with what, instead, would prove a more productive focus of legislative energy in a section titled: "This Legislation Ignores The Government's Most Critical Procurement Problem."

> I would be remiss if I failed to take this opportunity to address a pressing matter that cries out for Congressional attention and intervention.[11] The Federal Government must devote more resources to the acquisition function. This investment is urgent given the combination of the 1990's Congressionally mandated acquisition workforce reductions, the administration's pressure to outsource,[12] and the dramatic increase in procurement spending since the September 11, 2001 attacks and, now, hurricane Katrina.[13]
>
> Congress has been quick to call for more auditors and inspectors general to scrutinize Katrina-related contracting. That's a responsible gesture. But there has been no corresponding call for more contracting experts to perform the many functions that are necessary for the procurement system to work well. In order to serve the taxpaying public and meet the needs of Agency customers, acquisition professionals must promptly and accurately describe what the Government wants to buy, identify and select quality suppliers, ensure fair prices, structure contracts with proper monetary incentives for good performance, and manage and evaluate contractor performance.[14]
>
> Sadly, the contracting workforce desperately requires a dramatic recapitalization.[15] A bipartisan, post-Cold War, 1990's initiative severely reduced the contracting workforce, leaving the Government unprepared for a post-9/11 spending binge. In the last four years, contracting dollars have increased by half, without a corresponding increase in the workforce. For fifteen years, the Government skimped on training, while contracting officers faced increasing workloads and confronted increasingly complex contractual challenges. Scarce resources, when they become available, were allocated to oversight, rather than supplementing, supporting, or training contracting people. Senior procurement officials increasingly bemoan that no young person in his or her right mind would enter Government contracting as a career.
>
> The old adage—an ounce of prevention is worth a pound of cure—rings true. More auditors and inspectors general will guarantee a steady stream of scan-

---

(JRAC), because: "Some combatant commanders, as well as acquisition experts, don't realize that many legal requirements that tend to bog down military contracts don't apply during wartime. . . ." See, e.g., http://www.defenselink.mil/news/Nov2004/n11242004—2004112405.html.

[11] See also, Steven Kelman & Steven L. Schooner, Scandal or Solution?, GOVEXEC.COM http://www.govexec.com/dailyfed/1105/110705ol.htm (November 7, 2005).

[12] Outsourcing, or its more palatable pseudonym, "competitive sourcing," has been one of five Government-wide initiatives in the Bush management agenda. See, e.g., Executive Office of the President, Office of Management and Budget, The President's Management Agenda, Fiscal Year 2002, www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf. "President Bush is a major advocate of. . . hiring private firms to do the Government's work. . ." Dru Stevenson, Privatization of Welfare Services: Delegation by Commercial Contract, 45 ARIZ. L. REV. 83 (2003), citing, David J. Kennedy, Due Process in a Privatized Welfare System, 64 BROOK. L. REV. 231, 232 (1998) (referencing "Governor Bush's effort to privatize most of Texas' welfare system. . . in his attempt to make a name for himself. . . that could carry him to national office." See also, Matthew Diller, Form and Substance in the Privatization of Property Programs, 49 UCLA L. REV. 1739, 1763, n. 94 (2002) ("Governor Bush sought to hand the administration of the State's welfare system over to. . . Lockheed Martin. . . and Electronic Data Systems. . . .").

[13] See, generally, Steven L. Schooner, Feature Comment—Empty Promise for the Acquisition Workforce, 47 THE GOVERNMENT CONTRACTOR 203 (May 4, 2005), available at http://ssrn.com/abstract=719685; Griff Witte & Robert O'Harrow, Jr, Short-Staffed FEMA Farms Out Procurement, WASHINGTON POST D01 (September 17, 2005).

[14] A simple Iraq "lesson learned" was that, if the Government relies heavily upon contractors, the Government must maintain, invest in, and apply appropriate acquisition professional resources to select, direct, and manage those contractors. Unfortunately, insufficient contract management resources were applied. See, generally, Steven L. Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STANFORD LAW & POLICY REVIEW 549 (2005). For example, General Fay poignantly articulated: "[T]here was no credible exercise of appropriate oversight of contract performance at Abu Ghraib." MG George R. Fay, Investigating Officer, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, at 52 ("the Fay Report"). This problem exists Government-wide: "[T]he administration of contracts[,] once they have been signed[,] has been the neglected stepchild of [procurement system reform] effort." Steven Kelman, Strategic Contracting Management, in MARKET BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE at 89-90, 93 (John D. Donahue & Joseph S. Nye Jr. eds., 2002).

[15] See, generally, Federal Procurement: Spending and Workforce Trends, GAO-03-443 (April 2003); Steven L. Schooner, Fear of Oversight: The Fundamental Failure of Businesslike Government, 50 AM. U.L. REV. 627 (2001); Office of the Inspector General, Department of Defense, DoD Acquisition Workforce Reduction Trends and Impacts, Report D-2000-088 (February 29, 2000).

dals, but they'll neither help avoid the scandals nor improve the procurement system. Conversely, a prospective investment in upgrading the number, skills, and morale of Government purchasing officials would reap huge dividends for the taxpayers.

Moreover, just to be clear, no, my testimony was not written with Messrs. Zelenka, Perkins, or Feigin in mind.

Question 2. How would you characterize the work being done in New Orleans? Are these "seemingly ordinary tasks"? Are they mundane? Are these ordinary working conditions? Is there nothing unique about the situation? I ask this question because earlier this month, the mayor of New Orleans testified before the full EPW Committee and described the destruction as being "unprecedented" in nature.

Response. On a contract-by-contract basis, the lion's share of the work that would be covered by S. 1761, consistent with the work being done in New Orleans, can fairly be described—from a public procurement perspective—as ordinary or mundane. I do not dispute that the scope of the destruction is unprecedented. Nor do I mean to suggest that the affected work is in any way unimportant. Rather, this characterization merely reflects the nature of the work, rather than the working conditions, the situation, or the scope of the combined tasks.

To be clear, I use these terms to describe tasks such as search and rescue; demolition and repair; debris removal; and de-watering of flooded property in contrast to work for which (a) an extremely small number of contractors (or a limited pool of individuals) are capable of performing, or (b) unique facilities are required to perform, the work. To put this in context, the ordinary nature of the work is reflected in the fact that the private sector, in the United States and abroad, offers a nearly unlimited capacity to perform these tasks. Contrast this, for example, with the extremely limited private sector capacity available to design, manufacture, or repair a nuclear submarine.

As indicated above, my oral testimony was an effort to condense my prepared statement, which addressed this issue at great length under the heading: "Misuse of the Government Contractor Defense." Consider the following excerpt:

> This scenario is dramatically different from, for example, the types of contracts intended to be covered by the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act).[16] The SAFETY Act sought to encourage the development, and protect the use of, new or evolving (and, implicitly, unproven) technologies. The underlying assumption of the SAFETY Act is that, without insulation from liability, contractors might not otherwise permit the Government to deploy these technologies, known as qualified antiterrorism technologies (QATTS), to combat terrorism. In other words, the contracts involve unusual work or technologies (or unusual use of technologies) that is perceived as extraordinarily risky.[17]
>
> Here, the statute would apply to far more common, if not mundane, tasks. Although clearly important, by and large, the contracts that this bill would cover involve routine tasks such as search and rescue; demolition and repair; debris removal; and de-watering of flooded property. In all such cases, the existing standard of care seems reasonable. Moreover, the rather mechanical certification responsibility assigned to the Chief of Engineers is a far cry from the highly judgmental and discretionary decision required of the Homeland Security Department Under Secretary pursuant to the SAFETY Act. Specifically, the SAFETY Act employs a number of criteria,[18] most, if not all, of which are ab-

---

[16] Pub. L. 107-296, §861. See, generally, Homeland Security SAFETY Act page at https://www.safetyact.gov/DHS/SActHome.nsf/Main?OpenFrameset&6HYKFL;Alison M. Levin, Note: The SAFETY Act of 2003: Implications for the Government Contractor Defense, 34 PUB. CONT. L.J. 175 (2004).

[17] This point cannot be over-emphasized. For a good articulation of this principle, see, e.g., Patrick E. Tolan, Jr., Environmental Liability Under Public Law 85-804: Keeping the Ordinary Out of Extraordinary Contractual Relief, 32 PUB. CONT. L.J. 215 (2003) (emphasizing the unique (or, specifically, extraordinary) nature of the contractual requirements, particularly in research and development, that proved uninsurable because they involved, for example, nuclear power or highly volatile missile fuels).

[18] The seven criteria include: prior United States Government use or demonstrated substantial utility and effectiveness; availability of the technology for immediate deployment in public and private settings; existence of extraordinarily large or unquantifiable potential third party liability risk exposure to seller (or another provider of the technology); substantial likelihood that the technology will not be deployed unless SAFETY Act protections are extended; magnitude of risk exposure to the public if the technology is not deployed; evaluation of all scientific studies that can be feasibly conducted to assess the capability of the technology to substantially reduce risks of harm; and whether the technology would be effective in facilitating the defense

Continued

sent here. For example, it is difficult to create a scenario in which there would be a "substantial likelihood that the technology [involved in, e.g., debris removal] will not be deployed unless the [Gulf Coast Recovery Act] protections are extended."

STATEMENT OF PAUL BECKER, PRESIDENT, WILLIS NORTH AMERICAN CONSTRUCTION PRACTICE

Good afternoon. My name is Paul Becker; I work at Willis, a global insurance broker, as the North American Construction Practice Group Leader. I am proud to lead this practice, as my colleagues and I represent more than 3,500 construction related clients in North America. We work to structure and secure effective risk management programs that can address safety issues, contractual liabilities, surety bonds and more. I have been in the insurance business for 27 years—the vast majority of which has been in the construction sector—and it is my pleasure and honor to appear before you today testifying as to the importance of insurance in the clean-up of New Orleans in the wake of Hurricane Katrina—specifically the need to limit the liability of contractors engaged in this important work.

As insurance brokers, we work with our clients around the world and across all industries helping them assess, quantify, mitigate and transfer their risks thereby allowing them to focus on achieving their business goals. Doing so affords them the comfort and confidence that their assets—property, people, intellectual capital, equipment—are more than adequately and properly protected against a broad range of risks. We are not an insurance company—that is, we do not underwrite the risks. We are an intermediary bringing the two parties together working to fashion the very best, customized coverage we can secure for our clients. As part of this client advocacy, we work with and have developed strong relationships with insurance carriers around the world such that we know their risk appetite, how they consider certain risks and the various factors they weigh in their underwriting decisions. Given our experiences, we have a working knowledge as to how they think and how they approach various risks—essentially whether or not to underwrite a risk, how to price a policy and how to set the terms and conditions of a policy—which amounts to a contract.

EXPERIENCE WITH EXTRAORDINARY "JOB SITES"

In the aftermath of the events of September 11, 2001, Willis secured the insurance coverages for the contractors who cleaned up the World Trade Center site. Quite thankfully—for obvious reasons—the characteristics of this site were unlike any we or anyone else in either construction or insurance had previously seen. Normally, before the clean-up of a disaster site starts, environmental and engineering firms conduct studies, run assessments and issue reports as to the nature of the site and the specifics involved. Due to the outstanding circumstances of the events of 9/11, there was not time for such exercises and contractors got to work without a full understanding of what was ahead. How stable was the ground? What were the asbestos levels? What other hazardous materials could have a long-term impact on health of the workers and general public? Today, over four years since 9/11, the number of law suits being filed continues to grow. Only in time will we determine the balance between the insurance purchased vs. claims now being filed in New York. But one thing is certain, litigation, upon litigation, upon litigation has created a great deal of uncertainty and serious concern among the contractors involved.

While the scope of the New Orleans effort is multiples larger than the World Trade Center site, these same concerns are at hand today as they were in September 2001. The fundamental problem in securing the necessary coverage is a reflection of the four component actions I mentioned a few moments ago—insurance is about assessing, quantifying, mitigating and transferring risk. Models predict likely scenarios, calculate possible losses and then intelligent plans determine how to avoid such problems and spread the risk among various parties at an appropriate price. In these unique situations, there may be a tendency to focus on the financing of the risk so the work can get underway. Without the assessment, how does a carrier know what the possible losses are? And if the risks are unknown such that there could be significant unforeseen liabilities, 1) how can contracting firms adopt preventative measures to avoid problems which will give rise to future claims? and 2) how can carriers determine the right price for the coverage?

---

against acts of terrorism. See, e.g., Homeland Security SAFETY Act page at https://www.safetyact.gov/DHS/SActHome.nsf/Main?OpenFrameset&6HYKFL.

Over the last several weeks, we have been engaged in conversations with carriers around the world on this matter and they are expressing to us the very concerns that I am sharing with you today:

- Uncertain site conditions;
- Unusual and unknown health hazards;
- What chemicals are being released into the air during the cleanup?;
- The limited nature of the tools available to assess the number and types of environmental factors in play;
- Varying standards between local, state and Federal authorities;
- The fast track nature of the work to be done; and,
- The lack of certainty on contracting provisions and legal environments.

All these factors substantiate that the traditional methods of risk identification, control and underwriting have been significantly altered and make it difficult to estimate—or even guess—what the full extent of the long-term liabilities arising from the cleanup will be. It leads us to question whether the insurance industry has the ability to fully underwrite the risks inherent in this work. If this bears out, contractors will be left fending for themselves without adequate insurance protection. That is not to say that contractors will not be able to purchase insurance in some form for their activities in the Gulf; rather, without addressing the unique factors in this situation, the coverage they will be able to obtain will in most cases not adequately protect them over time from the exposures they will be facing. And this is not a question of if but when and based on our experience, these matters will manifest themselves over a 5- to 10-year timeframe—though there is already talk of the "Katrina Cough."

I might add that without adequate protection, contractors cannot properly account for their risks and endanger the long-term viability of their companies. Accordingly these issues could prevent quality contractors from participating in the clean-up and recovery efforts.

This is important legislation. While many first-rate contractors are already on the ground participating in this important effort, many others are hesitant to get involved in projects of this magnitude unless they have insurance against what are normally quantifiable risks. And carriers as well tend not to write policies if they are not able to make the necessary judgments. In the case of New Orleans, as it was with the World Trade Center, it will be almost impossible to establish the proper control procedures to protect their interests. Limiting the liability of construction companies engaged in the clean-up of New Orleans such that they can gain the cover they need is critical and it has been my distinct honor to share my experiences with you this afternoon.

Mr. Chairman, I've concluded the section of my prepared remarks that I would like to share with you today and am happy to enter the remainder—which addresses some general issues of insurance you may wish to consider—into the record. And I would be happy to answer any questions you might have.

SOME ADDITIONAL BACKGROUND ON INSURANCE

Insurance is meant to have the premiums of many similarly insured parties pay for the losses of the few which actually have claims. By financing risks in such a way, insurance serves as a vital tool supporting commercial activity. It brings the assurance of capital when the unforeseen and unfortunate event occurs. Insurance enables construction firms to undertake work knowing that they have a financial partner ready to provide capital that may be necessary to assure that the contractor remains viable and can complete the work as promised.

Both the insurance carriers and their insured construction contractors have a great interest in working together to identify risks and to develop effective protocols and procedures to avoid or control those risks. Clearly identifying and managing risks to avoid losses is the most cost-effective approach for both parties. This critical part of the insurance process, that of identifying and trying to measure risks, is often not understood by non-insurance professionals, but it is completely integrated into the process of agreeing to insure certain risks and how much such insurance costs. Simply put, if insurance companies do not or can not understand the risks they are being asked to insure, they have a very difficult time providing the risk financing which allows companies to operate.

Insurance policies by their nature are specific to different types of risks and exposures, and contractors often purchase a number of different types of coverage each year to address different operational risks. The most relevant to today's hearing are the coverages which come into play for liability protection when claims are brought by third parties. They include:

• General Liability Insurance, which addresses the liabilities contractors have to third parties for operations and for damages or injuries which occur once those operations are completed. This coverage applies to many obvious types of situations including injuries to third parties, and damage to property while performing operations and once the work is completed. These policies do not normally extend to environmental liabilities which arise out of the work. Those types of risks are usually insured by Pollution Liability policies.
• Contractors Pollution Liability, which addresses liabilities that arise out of hazardous materials which contractors encounter on job sites. In the case of the clean-up and reconstruction activities it is expected that this will be a critical coverage. It is important to note that this policy differs from insurance company to insurance company and as a result has significant differences in scope of coverage and limits of liability which can be obtained.
• Umbrella and Excess Liability, which is used as a method to obtain higher limits of coverage excess of the General Liability insurance limits. It does not act to increase the pollution liability limits.

To understand the complex limitations of such insurance, it is important to note:

• Each insurance company offers different coverages for each policy depending on their underwriting philosophy and financial goals.
• Policies are underwritten based on the underwriters' understanding of the risks and typically narrowed to cover those risks which are known or can be anticipated.
• These policies all have a defined limit of insurance which once exhausted, cause the policies to no longer respond.
• The policies respond to the liability of the specific contractor so it is often the case that a claim will cause several insurance carriers to respond to several contractors. This can cause significant delays in addressing claims as liability is sorted out by the legal process and each carrier defends each insured separately.
• Coverages vary as noted from carrier to carrier and from contractor to contractor based on the individual contractors' understanding of its risks, its expertise in obtaining coverage and the amount of premium involved.

Insurance is a risk financing business which uses historical data to predict future costs and establish premiums. The limitations noted above create a situation where, in the case of a broad based catastrophe such as Katrina, claims will be unknown at the outset, difficult to predict or measure, and subject to uncertainty of how insurance coverage will respond. This contrasts with normal construction activities where underwriters have significant experience and data which shows a path to pricing the risk and taking on the exposure in the form of insurance policies.

RESPONSE BY PAUL BECKER TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question 1. Mr. Becker, In your testimony, you stated that insurance is about assessing, quantifying, mitigating and transferring risk and you wonder if the insurance industry has the ability to fully underwrite the risks related to a tragedy like Hurricane Katrina.

The exceptionally broad liability shield for contractors in S. 1761 passes the risk of loss from the insurer and contractor to the citizens of the Gulf Coast. How does the bill's treatment of private citizen correlate to the insurance industry's usual practice of spreading the risk among parties?

Responce. Senator Jeffords, thank you for your question on how the Gulf Coast Recovery Act's (S. 1761) treatment of private citizens correlates to the insurance industry's usual practice of spreading risk among parties.

In evaluating risks, the insurance industry typically evaluates the exposures and the spread of the risk among parties. In the case of the damages from Hurricane Katrina, the insurances community needs to first determine the risks and exposures that will be associated from the recovery efforts. Without this information, insurance carriers will be unable to provide accurate coverages and establish reasonable premiums. As a result, contractors will be assuming risk which will be difficult to predict (or in many cases will be impossible to identify) and will be faced with essentially rolling the dice on longer terms risks versus available insurance.

Absent of a large disaster like Hurricane Katrina, the typical spread of risk by insurance carriers remains a difficult job. Given the broad affects of claims that arise out of construction general liability insurance coverages, the insurance industry must consider the various contractual relationships of their insured contractors. In the evaluation to exposures and the adjustment of losses, the insurance industry also takes into consideration Federal and local jurisdictional statutes that may alter the liability of their insured. In many local jurisdictions (for example— Georgia and Florida), contractors are afforded liability caps in situations where all project speci-

fications of a State's Department of Transportation Contracts were adhered to. Thus, in cases of lawsuits against roadway contractors alleging a design defect in the roadway (possibly causing an automobile accident—for example), these statutes provide equal protection to contractors who built or re-designed a roadway to the exact specifications and codes stated by the local Department of Transportation.

In the end, S. 1761 would provide insurance carriers greater information on potential risks from the recovery efforts. The bill's effects on the evaluation of exposures and spreading of risk by the insurance industry would be similar to their typical assessment of other Federal and local statutes that alters liability in loss situations among parties.

STATEMENT OF THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION

Chairman Thune and other members of the subcommittee, thank you for providing the American Road and Transportation Builders Association (ARTBA) an

opportunity to submit testimony on Government contractor liability issues arising from major disaster situations. ARTBA is the only national organization representing the collective interests of the transportation construction industry before the Federal Government. ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than $200 billion annually in the United States economic activity and sustains more than 2.2 million American jobs.

Mr. Chairman, there are two common themes to every national disaster situation: they occur with little to no advance warning; and a herculean response and recovery effort is required by those in and outside the affected area. Major disasters hit hard and fast. Those responding to these events must be allowed to react with the same vigor. The widespread damage accompanying national catastrophes frequently call for a comprehensive response from a host of partners, including the construction industry.

Federal, State and local Governments need the assistance of the construction industry in these situations. ARTBA member firms routinely—and voluntarily—step up when emergencies arise. Construction and engineering companies are often the first responders in declared disasters, providing critical knowledge, know-how, and skills—as well as equipment and materials—to rescue and recovery efforts. Working at the direction of public agencies and officials, these firms lead efforts to demolish, remove, and repair and reconstruction damaged utilities, structures and facilities.

Our industry, for example, played a major role in the rescue and recovery efforts following the September 11 terrorist attacks on the World Trade Center and Pentagon. Employees of Tully Construction of Flushing, New York, were among the first to arrive at the Ground Zero site. Tully was completing work on the Westside Highway in Lower Manhattan when the attacks occurred, which enabled the firm to have equipment and manpower in place to begin assisting with rescue, recovery and debris removal efforts immediately.

Once the magnitude of the devastation and the complexity of the clean-up necessary were fully understood, the industry's role at the site increased, and these firms and individuals remained on the job until it was completed. Tully was named as one of the four prime contractors responsible for debris removal, demolition work, and construction of temporary structures at the site. ARTBA's New York City chapter—the General Contractor's Association of New York—provided critical leadership to the efforts by assisting Federal, State and local officials in the coordination of operations. Numerous engineering firms provided technical expertise and project managementexperience to carry out the complex recovery effort. Finally, equipment manufacture's worked to locate and deliver the construction machinery necessary to carry out the clean-up.

Many of these activities were carried out before contracts for the work could be drafted and signed. Rescue and recovery could not wait for contracts, and these firms did not hesitate to assist Federal, State and local officials in the efforts.

The transportation construction industry also routinely provides Federal, State and local officials assistance in recovery, repair and rebuilding efforts following natural disasters. After Hurricane Katrina devastated the Gulf Coast, ARTBA member firms joined in efforts to clear debris and reopen airport, roadway, rail, transit and other transportation infrastructure facilities damaged during the hurricanes.

In assisting Federal, State and local Governments respond to disasters, these contractors are often times exposed to liability and litigation for doing the right thing and responding in time of national tragedy. Unlike public officials and the agencies

firms are assisting, private contractors are not protected by the principle of sovereign immunity.

The firms responding to the September 11 terrorist attacks were subject to substantial litigation costs. With approximately 3,000 actions filed to date against the contractors involved in the Ground Zero site clean-up, litigation cost are expected to grow. In fact, several of these companies were threatened with the loss of insurance coverage for the potentially open-ended liability they incurred by doing the right thing.

As such, the threat of class action lawsuits and lack of liability protections could dampen private firms' response to emergency situations. Contractors do not carry the insurance necessary to cover all of the many potential risks involved in taking necessary action during times of crisis. Companies are risking crippling financial impacts on their firm for responding to emergency situations for which they do not have liability coverage. The lack of limited liability protections for construction and engineering firms providing important public service during emergency situations could undermine response, and ARTBA urges congressional action to ensure that the threat of open-ended lawsuits does not slow or block future disaster recovery efforts.

To this end, ARTBA fully supports, the "Gulf Coast Recovery Act," S. 1761. This measure would better prepare our nation for disaster response by ensuring that construction and engineering firms that respond to major natural disasters, terrorist incidents or other emergencies are not putting themselves at risk for unwarranted liability claims and litigation tied to rescue and cleanup efforts. This common-sense proposal would provide contractors assisting in rescue, recovery, repair, and reconstruction work a limited measure of liability protection. In doing so, the bill would also limit potential legal actions that slow recovery efforts and reduce legal expenses that lead to increase recovery costs.

Specifically, S. 1761 would provide the construction firms working on Hurricane Katrina and major future disasters the same liability protections Congress provided security technology companies from lawsuits that arose out of the September 11 terrorist attacks. It would also make critically important legal procedural improvements to ensure that firms and contractors receive the protections necessary to allow them to focus rescue, recovery and rebuilding efforts without having to worry about being subjected to unwarranted and costly lawsuits.

While S. 1761 provides limited liability protection to contractors, it would not undermine Federal safety, health, ethics, environmental or labor laws. Contractors would remain liable for any reckless or willful acts, and would remain subject to punishment for noncompliance with any Federal rule or regulation. S. 1761 would not limit the command of the Federal agencies charged with rescue, recovery, and rebuilding efforts.

As was demonstrated in New York City, the ability of transportation construction industry firms to respond quickly during times of crisis, delicately move large amounts of debris and manage complex projects under demanding conditions are invaluable skills when responding to any emergency. Without reasonable protections, however, our industry's ability to respond to future acts of terrorism, natural disasters or other emergencies would be constrained.

S. 1761 would provide reasonable level of liability protections for construction and engineering firms involved in the clean-up efforts in the Gulf Coast region and future major disasters, without undermining Federal laws or requirements. This legislation will also help ensure that construction and engineering firms continue to serve as first responders in future emergency situations. Thank you again for the opportunity to submit testimony on this important topic. We look forward to continuing to work with the subcommittee and its members to address this situation.

STATEMENT OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS

Mr. Chairman and Members of the Subcommittee. The American Society of Civil Engineers (ASCE)[1] is pleased to offer this statement for the record in support of S. 1761, the Gulf Coast Recovery Act of 2005, a bill that would clarify the liability of Government contractors assisting in rescue, recovery, repair, and reconstruction

[1] ASCE, founded in 1852, is the country's oldest national civil engineering organization. It represents more than 139,000 civil engineers in private practice, Government, industry, and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE carried out Building Performance Assessments of the World Trade Center, the Pentagon, and the Murrah Federal Building, and technical assessments following earthquakes, hurricanes, and other natural disasters. ASCE is a 501(c) (3) non-profit educational and professional society.

work in the Gulf Coast region of the United States affected by Hurricane Katrina or other major disasters.

We believe the bill is a good start toward enacting a broad-based Federal "Good Samaritan" law to protect professionals who engage in disaster recovery efforts at great potential cost to themselves. As of now, 21 states have Good Samaritan legislation to cover those who respond to natural disasters and other emergencies. Louisiana, Mississippi, Alabama, and New York do not have Good Samaritan legislation at all. We are not aware of any state laws that protect those who would aid in the recovery from terrorist attacks or the aftermath of such attacks. When professional design and construction expertise is needed, there should be no legal impediment to our members' responding to provide help and possibly saving lives.

ASCE encourages its members, as individuals, to provide pro bono expertise and professional services to charitable causes and those in emergency situations. Members who provide professional services pro bono for ASCE-endorsed programs are covered by the Society's liability insurance.

But pro bono services provided by an individual in emergency situations or to charitable institutions outside of ASCE's endorsed programs are not covered by the ASCE liability policy. The engineer, in emergency situations, may be called upon to make decisions with little or no opportunity for study, evaluation, or even identification of alternatives and should not be held to the same standard of care that would be used in evaluating her actions under normal circumstances. Legislation is needed to protect the engineer under these circumstances.

Engineers have the technical ability to assist in emergency situations. Protection as proposed in S. 1761 rightly would not relieve the engineer of responsibility to act in accordance with the ASCE Code of Ethics. The engineer must continue to act within his appropriate level of expertise, with due recognition of the limitations of that expertise.

Finally, the United States legal system has evolved to a point where excessive litigation, including frivolous lawsuits, often occurs. Moreover, findings of liability increasingly bear no relationship to the proportion of fault in a case, and astronomical damage awards for unquantifiable claims are frequently granted.

The enormous growth in litigation against businesses and professionals, coupled with excessive and unreasonable jury awards, has led to dramatic increases in insurance premiums, reduced policy coverage, and even outright cancellations of professional liability insurance coverage.

A growing number of professional engineers, including those with little or no history of litigation ever brought against them, have found that professional liability insurance is a substantial cost of doing business. In addition, efforts to advance innovation, new products and designs are inhibited by the current legal climate.

ASCE is very concerned about the adverse economic impact of the nation's litigation crisis and escalating liability insurance costs on the civil engineering profession. These adverse economic impacts affect the availability and affordability of professional liability insurance needed for the orderly and responsible conduct of business, including engineering services, in the United States.

Mr. Chairman, ASCE thanks you for your efforts. Please do not hesitate to call on us for assistance with this important legislation.

THE ASSOCIATED PRESS ARTICLE

HUNDREDS SUE OVER HEALTH EFFECTS OF WORLD TRADE CENTER CLEAN-UP

NEW YORK—Hundreds of people who worked on the World Trade Center clean-up have filed a class-action lawsuit against the leaseholder of the towers and those who supervised the job, alleging they did little to protect workers from dust, asbestos and other toxins in the air.

The lawsuit, filed in Federal court on Friday and made public Monday, was brought against Silverstein Properties and the four construction companies hired to oversee the removal of the 1.5 million tons of debris.

David Worby, a lawyer for the plaintiffs, said he will seek billions of dollars in compensation for victims. The lawsuit also asks for the establishment of a system to track for the next 20 years all those who were exposed.

The lawsuit alleges that many workers did not have access to protective gear, and those who did were not taught how to wear it properly.

While some of the plaintiffs suffer from afflictions ranging from tumors to heartburn, many say they show no symptoms from their work at the site, but have joined the suit because they fear they risk developing cancer in the future.

"The tragic reality is that so many of the brave heroes who worked so tirelessly and unselfishly are becoming a second wave of casualties of this horrific attack, and we're only seeing the tip of the iceberg," Worby said.

The defendants said they had not seen the complaint and had no immediate comment.

The class-action case, with about 800 plaintiffs, was filed the last day before a Federal 3-year statute of limitations expired for lawsuits related to the terrorist attack.

The Government is already funding six health screening programs to monitor ground zero workers, but none are funded beyond 2009.

Last week, the Centers for Disease Control and Prevention released a study showing that many recovery workers suffered from respiratory problems long after the clean-up concluded, and that some still battle ailments. Problems include asthma, sinusitis, constant coughing and stuffy nose, facial pains, chest tightness, wheezing and shortness of breath.

Proper respiratory gear would have allowed the workers to block out smoke, dust, diesel exhaust, pulverized cement, glass fibers, asbestos and other chemicals and prevent throat and lung diseases, according to the CDC study. It found that only about one in five of the workers wore respirators while they worked at the site.

The four companies that led the clean-up were Turner Construction, AMEC Construction, Tully Construction and Bovis Lend Lease. According to AMEC's Web site, the company stationed safety experts on site during the clean-up and provided respirators, hard hats and safety goggles to workers.

○